DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Craig Hancock
v
Sydney International Container Terminals Pty Limited
(U2024/5603)

DEPUTY PRESIDENT WRIGHT SYDNEY, 20 FEBRUARY 2025

Application for an unfair dismissal remedy – drug and alcohol testing following incident – positive test result for alcohol – drug and alcohol policy – valid reason for dismissal — dismissal was harsh and unreasonable – reinstatement order

Introduction and outcome

[1] On 22 May 2024, Mr Craig Hancock made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Sydney International Container Terminals Pty Ltd trading as Hutchison Ports Sydney (Hutchison).

[2] Hutchison operates an intermodal container stevedoring terminal at Port Botany in the state of New South Wales. Mr Hancock was employed as a stevedore by Hutchison. On 2 May 2024, Mr Hancock was dismissed after he tested positive to alcohol following a workplace incident.

[3] In summary, I have found that Mr Hancock breached Hutchison's Drug and Alcohol Policy and that this was a valid reason for dismissal. However, due to other factors, including that Mr Hancock was not aware of the changes to the Drug and Alcohol Policy which reduced the cut off level for alcohol to 0.00 and that Hutchison did not provide adequate training to employees in relation to the policy, I have determined that Mr Hancock's dismissal was harsh and unreasonable and made orders for reinstatement, lost remuneration and continuity of employment.

The hearing

[4] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[5] After taking into account the views of Mr Hancock and Hutchison, and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing pursuant to s.399 of the FW Act.

[6] At the hearing, Mr Hancock was represented by Mr Kirk Bond, National Legal Officer, Maritime Union of Australia Division of the Construction Forestry and Maritime Employees Union (MUA). Hutchison was represented by Mr Paul Brown, Lawyer, who I granted permission to appear pursuant to s.596(2) of the FW Act as I was satisfied that it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter.

[7] The following witnesses gave evidence at the hearing on behalf of Mr Hancock, and were cross-examined by Mr Brown:

1. Mr Hancock
2. Mr Michael Samperi
3. Mr Leigh Bowman
4. Mr Benjamin Robertson
5. Mr Darren Trimmer
6. Mr Malcolm Dominquez
7. Mr Barry McGrath
8. Mr Lachlan Beesley
9. Mr Mark Armeni
10. Mr Paul Wallington

[8] Mr Greg Smith, Mr Kerry Farrell, Mr Paul McAleer, Mr Ryan Angwin, Mr Phil Way and Mr Chris Smith also provided witness statements on behalf of Mr Hancock. These witnesses were not required for cross-examination and their statements were admitted without objection by Hutchison.

[9] The following witnesses gave evidence on behalf of Hutchison and were cross examined by Mr Bond:

1. Mr Geoff Hughes
2. Mr Lawrence Moon

[10] Mr Aaron Stockdale also provided a witness statement on behalf of Hutchison which was admitted without objection by Mr Hancock. Mr Stockdale was not required for cross-examination.

[11] Mr Hancock filed submissions in the Commission on 29 July 2024, 18 September 2024 and 11 October 2024. Hutchison filed submissions in the Commission on 16 August 2024 and 2 October 2024. I have considered the submissions made by the parties and all of the evidence before me in my determination of this matter and the conclusions I have reached.

Background facts

[12] Mr Hancock is 55 years old. From March 2000 to October 2013, Mr Hancock worked as a Crane Operator for Patrick Stevedores at its Port Botany operation. Mr Hancock commenced working as a Stevedore for Hutchison on 21 October 2013.[1]

[13] Hutchison is an intermodal container stevedoring terminal at Port Botany in the state of

New South Wales (the Port Botany Terminal). Conditions of employment at the Port Botany Terminal are covered by *Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021* (2021 Enterprise Agreement).[2]

[14] Hutchison operates as a 24-hour terminal. There are three shifts of 8 hours each day. The Agreement refers to these shifts as Day, Evening and Night shifts. The shifts are as follows:

a. Day 6.00am – 3.00pm
b. Evening 2.00pm – 10.00pm
c. Night 10.00pm – 6.00am[3]

[15] Mr Hancock's roster consisted of:

a. One week of day shifts;
b. One week of afternoon shifts;
c. One week of night shifts; and
d. One week off.[4]

[16] Mr Hancock is a member of the MUA. Mr Hancock was elected by Hutchison MUA members to represent them as a delegate in about 2013 or 2014 and acted as a delegate throughout his employment with Hutchison.[5]

[17] Mr Hancock was a member of the MUA bargaining team for the 2021 Enterprise Agreement. Bargaining occurred over a thirty-two-month period and involved extensive meetings between MUA Officials, workplace delegates, and Hutchison management. Mr Hancock said that the bargaining was often extremely contentious, and MUA members took multiple periods of protected industrial action.[6]

Events leading to dismissal

[18] On 31 March 2024, which was Easter Sunday, Mr Hancock was rostered to commence work at 10:00pm. Shortly before attending work that day, he drank a glass of wine with a neighbour who had invited him over for a quick Easter toast. Mr Hancock believed that the amount of wine he drank would not put him at risk of testing over Hutchison's alcohol limit, which he believed to be 0.02.[7]

[19] During his shift, Mr Hancock was involved in an accident while driving the quay line crane. Mr Hancock said that the accident was due to miscommunication between him, the Straddle Driver, Mr Alaine Caughey, and the Team Leader, Mr Benny Kreger. Nobody was injured, but there was some damage to the straddle.[8]

[20] Mr Geoff Hughes is employed by Hutchison as the Manager Terminal Operations, based at the Port Botany Terminal. Mr Hughes commenced employment with Hutchison in 2016. In his current role, Mr Hughes is responsible for managing the day to day operations of the Port Botany site. Prior to his current role, Mr Hughes was employed as the Manager – HR and Training at the Port Botany Terminal for over five years.[9]

[21] Mr Hughes explained that at 10:30pm, shortly after the commencement of the night shift, a Quay Crane 2 (QC02) operated by Mr Hancock was loading 40 foot containers onto the Rio Grande vessel. At 10:31pm, Mr Hancock loaded the last of these containers on to the deck of bay 18 of the vessel, while Shuttle 2 (SC02) came underhook and landed a single 20 foot reefer container on the southern end of the container stand. Mr Hughes said that it was later identified that the reefer container had to be turned around to be positioned with its motors aft. This is a movement which must be done with a Shuttle. The Ship Team Leader (Ship TL) then made the call by radio to move the container into the 'motors aft position'. Following the Ship TL radio call, both SC02 and QC02 proceeded to pick up the container from the landing platform causing QC02 to collide with SC02.[10]

[22] Mr Hughes said that the incident occurred at 10:36pm and immediately after the incident, both the operators of the QC02 and SC02 were directed to submit to drug and alcohol testing.[11] Mr Hancock's initial test at 11:39pm recorded a reading of 0.025 for alcohol. The confirmatory test, which took place 30 minutes later at 12:09am, recorded a reading of 0.017 for alcohol which Mr Hancock said he believed was below Hutchison's cut off levels. Mr Hancock said that he conveyed his belief in this regard to the tester.[12]

[23] The Shift Manager at the time, Mr Pierre Martin, told Mr Hancock that, because he had tested positive, he could not continue his shift. Mr Hancock then left the workplace and drove home.[13]

[24] On 1 April 2024, Mr Hancock telephoned Mr Hughes about the incident and they had a conversation. Later that day, Mr Hughes sent Mr Hancock a letter confirming his immediate suspension in accordance with the Drug and Alcohol Policy. An investigation of the matter commenced on 4 April 2024 and was completed on 12 April 2024.[14]

[25] On 12 April 2024, Mr Anthony Oliver, National Manager – Human Resources and Industrial Relations sent Mr Hancock a letter requiring him to attend a disciplinary meeting on 15 April 2024. The purpose of the meeting was to provide Mr Hancock with an opportunity to respond to the matters set out in the letter including the possibility of dismissal. The meeting was rescheduled at Mr Hancock's request to 16 April 2024.[15]

[26] On 16 April 2024, a disciplinary meeting was held at 1:10pm at the Port Botany Terminal. Mr Hughes attended the meeting with Mr Aaron Stockdale, Manager – HR and IR. Mr Hancock attended the meeting with his support persons, Mr Nathan Donato and Mr Brad Dunn, both from the MUA and Mr Tommy Herbert who is a MUA delegate and Hutchison employee. Mr Hughes said that during the meeting, the following matters were raised by or on behalf of Mr Hancock:

- Mr Hancock had just moved into a new place in a unit. His neighbours came over as he had people there. He said that he was going to work. He had a glass of red wine which he doesn't even drink. That was it then he left.
- When Mr Hancock left home at 9:30 pm, he honestly didn't think he was over. If he was trying to be sneaky, he wouldn't have gotten in the crane. He owned it, it happened, he won't deny it.
- Mr Hancock told the person who administered the test that he thought the cut off for alcohol was 0.02.

- Mr Hancock was not intoxicated, did not feel anything, did not think that he would have a reading at all.
- Mr Hancock was not consciously breaching the Drug and Alcohol Policy
- Mr Hancock said that he did not think he would register and did not think he had had enough.
- Mr Hancock said that it was a mistake, and he apologised. If he thought he was over (the limit) he would not have got on the crane. He would have said, 'Benny Kreger you drive first.'
- There is no correlation between Mr Hancock breaching the Drug and Alcohol Policy and the accident. Mr Hancock would not have done anything different.
- Going forward, Mr Hancock does not want to lose his job, he just wants to cruise by. It's a big lesson. Drinking won't happen again.
- Mr Hancock was poured a big glass of wine, although he doesn't drink wine, and should not have done.
- Mr Hancock would like to find an alternative to termination of employment. The MUA is happy to sit down to accept an alternative package for Mr Hancock to be fully educated and aware of his responsibilities.
- Mr Hancock does not want to be judged on history. In the past, it was the wild west back in that day. He loves his job and apologises.
- As to Mr Hancock's character, everyone in the terminal backs him up. He is one of the best crane drivers, one of the best delegates. He is trusted and everyone relies on him.
- He's been honest. The whole workforce and union want him here, he does his job to a high degree.
- It's an overreach considering the Drug and Alcohol Policy, past incidents and strikes policy (referring to the policy permitting three breaches before termination). Mr Hancock has owned this misunderstanding. This is the first strike, lesson learned. Others have never been terminated on the first thing. At the end of the day, it is a breach of policy. Members get two strikes before termination. Others compared to what Mr Hancock has done have come back worse and impact effects on their body worse and they weren't terminated. The MUA says this is an overreach, where others have had a chance.[16]

[27] Mr Hughes considered the material available to him and the responses by and on behalf of Mr Hancock arising out of the disciplinary meeting on 16 April 2024, and formed the view that Mr Hancock's employment with Hutchison should be terminated for serious misconduct.[17]

[28] On 2 May 2024, Mr Hancock received a letter from Hutchison advising that his employment was terminated for serious misconduct because of the positive test result, 'as well as [Mr Hancock's] disciplinary history, which includes previous breaches of the Drug and Alcohol Policy'.[18] The letter was provided to Mr Hancock during a meeting with Mr Hancock, Mr Paul Keating from the MUA and Mr Stockdale.

The letter said that Hutchison had had regard to each of the following:

- You knowingly consumed alcohol before your shift.
- Your BAC was above the required 0.00% at the commencement of your shift. As stated, you drank alcohol at 9:30pm on 31/03/24. Your shift commenced at 10pm. The incident occurred at 10.36pm.

- You returned a BAC reading of 0.025% at 11:39pm and subsequent reading of 0.017 at 12:09am on 01/04/24 some 2 hours and 9 minutes after your shift began.
- You knowingly breached the Drug and Alcohol Policy
- You disregarded the Drug and Alcohol Policy and attempted to justify your decision making when you stated 'if I thought I was over, I wouldn't have gone up in the crane, I would have sent Benny up to drive first.[19]

[29] In relation to the last dot point above, Mr Hancock said the following during cross-examination:

> …what I meant by that is if I was sneaky and thought I was - thought I was over the influence or anything I wouldn't have gone up and drove. I wouldn't have drove. I wouldn't have been there to start with, but if I was that type of person to be sneaking around, why would I go and drive the crane first? It would make no sense. If I was conscious of being over the limit it would make no sense that I got up and drove that crane. I could have had someone else drive it. No sense whatsoever, if I was that type of person, to rock up there like that.[20]

[30] Mr Hancock's evidence was that as far as he was aware, Hutchison did not hold any meetings with employees to explain that the Drug and Alcohol Policy was being amended from a 0.02 cutoff level to 0.00. The change was not discussed in any toolbox meeting that he attended, and an amended policy was not presented to Mr Hancock for his signature to demonstrate that he was aware of the changes and agreed to abide by them.[21]

[31] Mr Hancock said that for the entire time that he worked at Hutchison a safety bulletin was posted on the main notice board that is located in the hallway near the entrance to the kitchen and change rooms notifying employees that the cutoff level for alcohol under the Drug and Alcohol Policy is 0.02. Employees are encouraged to read policies, safety bulletins, changes to rosters, and other important documents that Hutchison posts on the notice board. Mr Hancock reviewed documents posted on the notice board regularly, and throughout his time working for Hutchison. Prominently displayed on the noticeboard was a Drug and Alcohol Policy safety bulletin that informs employees 'blood/alcohol concentration (BAC) for workers on a HPA site must be less than 0.02'. Mr Hancock provided photos taken by colleagues which showed that the Drug and Alcohol bulletin that identified the cutoff level for alcohol as 0.02 was still posted on the notice board as at 27 May 2024.[22]

[32] Mr Hancock said that since Hutchison terminated his employment, he has sought work in the construction industry but, to date, his efforts have been unsuccessful. Mr Hancock has not secured a job since Hutchison terminated his employment. Mr Hancock is seeking reinstatement.[23]

Drug and Alcohol Policy

[33] Mr Hughes said that the Drug and Alcohol Policy has been in place at the Port Botany Terminal since 29 July 2013 and was recently amended with effect from 7 March 2023 to set the allowable limit for alcohol across the entire Port Botany Terminal to 0.00 Blood Alcohol Concentration (BAC).[24]

[34] Mr Hughes said during the hearing that he initiated the change to the Drug and Alcohol Policy after two employees who underwent drug and alcohol testing disclosed to the tester that they had consumed a beer with their meal during the meal break. One of these employees was tested following a safety incident and the other employees was tested randomly. Neither of them recorded a positive result. Mr Hughes said that these disclosures led to an increase in random testing and ultimately to a change in the policy but no employee was detected to be over the limit during that time.[25] Mr Hughes said that the incidence of employees recording a positive test for alcohol under the current policy or previous version was 'not frequently at all.'[26]

[35] Mr Hughes said that consultation with the Work Health and Safety (WHS) Committee regarding this amendment first commenced at the WHS Committee meeting on 28 February 2022. The amendment was discussed at each WHS Committee meeting until 10 May 2023 when the item was closed. At this time, new alcohol breathalyser testers were purchased, installed and calibrated to set the allowable limit of alcohol of 0.00 BAC.[27] The minutes of the WHS Committee meeting on 15 March 2023 stated:

> Drug and Alcohol Policy (HSEQ3.19) – Internal Audit Findings
>
> Update 15-03-23: The Drug and Alcohol Policy has been issued.
> Action: The WHS Committee has asked that the updated Policy is issued to all employees on their personal email address so that they are informed. Also BB to arrange for ToolBox notifications via Shift Manager.[28]

[36] Mr Hughes said that the updated Drug and Alcohol Policy was circulated to all employees at the Port Botany Terminal by email by Hutchison Human Resources on 16 March 2023. That day, managers of Hutchison, including Mr Hancock's Manager Mr Pierre Martin, Shift Manager, were also directed to advise employees at toolbox meetings that the Drug and Alcohol Policy had been updated.[29]

[37] During cross examination, Mr Hancock said that he either did not receive the email containing the updated Drug and Alcohol Policy or he did not open it, or it went to the spam folder. He said a lot of employees do not open emails from work because they are very negative and threatening, so they are hard to read.[30] If something is important, employees are told at work, or they sign off on it at work, and that's what they sort of go by.[31]

[38] Mr Hughes said that Mr Hancock attended work on 17 and 19 March 2023 and that the update to the Drug and Alcohol Policy was communicated to him at toolbox meetings by his managers Mr Lawrence Moon and Mr Mark Evans during these shifts.[32]

[39] Mr Hughes said that in addition, copies of the updated policy bulletin were displayed prominently around the Port Botany Terminal including on the main Safey Noticeboard in the amenities room and in the safety office noticeboard. Copies of the updated policy bulletin were also openly available on the table inside that office and a further safety noticeboard inside the amenities building. All of these locations are places that employees walk through regularly to access locker rooms and break time on each shift.[33]

[40] During cross examination, Mr Hughes agreed that he did not know whether any particular employee who received the email, opened it and understood the contents.[34] He said

that employees regularly get downtime on shifts where they could read emails or policies or anything they chose to read.[35] Mr Hughes said that Hutchison does not specifically set aside time for employees to sit down and read emails, but there is quite a bit of downtime on shift on a regular basis where employees could read emails or any other information that was sent to them.[36] Mr Hughes said that employees are not allowed to carry mobile phones in operational areas, but during downtime if they are waiting for a vessel arrival, for example, they are welcome to use their mobile phones in the lunch room.[37]

[41] Mr Hughes agreed that even if there was talk among employees that Hutchison was proposing to change the Drug and Alcohol Policy, employees would not know when that change would be implemented until they were told.[38]

[42] The Drug and Alcohol Policy provides, under the heading 'Purpose':

- All employees, visitors and contractors that are directly engaged by HPA, are required to be drug and alcohol free while at work or on duty, on HPA premises or elsewhere.
- The unauthorised use, possession, sale, manufacture, solicitation or distribution of any drugs or alcohol on HPA premises is prohibited. All HPA premises are to be Drug and Alcohol free areas with no exceptions.
- Employees, visitors and contractors that are directly engaged by HPA must, if required, submit to drug and/or alcohol testing. HPA may conduct drug and alcohol testing prior to employment, after incidents, upon reasonable suspicion, after an employee has self-identified as having a drug or alcohol problem, after rehabilitation in accordance with this policy, and in accordance with HPA random selection procedure for drug and alcohol testing.
- Employees and contractors who breach this Policy will be subject to disciplinary action which may include termination of employment and/or contract.
- Employees who have a drug or alcohol related problem are encouraged to self-identify and enter into a recognised rehabilitation program. HPA is committed to ensuring the availability of a confidential and non-judgmental response for employees with drug or alcohol related problems through its Employee Assistance Program (EAP). HPA guarantees confidentiality for those who self-identify in accordance with this Policy and the related Procedure. If a person self-identifies, HPA will support and assist the employee to return to work within a reasonable period of time.
- Self-identification is not a means of avoiding or mitigating disciplinary action. Employees who self-identify when requested to undertake a drug or alcohol test, or who self-identify after a test is conducted, will not be exempt from any disciplinary action which may result from the test as it is the employee's responsibility to be Fit for Work.[39]

[43] Clause 3.1 sets out the responsibility of Managers under the Drug and Alcohol Policy. Clause 3.1 provides that in support of the policy, managers are required to ensure person(s) are relieved immediately of their duties where required for the purposes of drug and alcohol testing following an incident (which is mandatory for incidents involving the operation of terminal vehicles and mobile plant), as part of a random testing program, for reasonable cause or at an employee's request. Further, this clause states that the Shift Manager is responsible for contacting the testing agent to request testing to be undertaken as required.[40]

[44] Clause 4.1 of the Drug and Alcohol Policy states:

> The acceptable levels for blood/alcohol concentration for employee or contractor on a HPA site is Zero (0.000) %BrAC.[41]

[45] Prior to the Drug and Alcohol Policy being amended on 7 March 2023, clause 4.1 stated:

> The acceptable levels for blood/alcohol concentration for employee or contractor on a HPA site is less than 0.02%. This level however will vary in accordance with industry codes of practice, standards and legislative requirements.
>
> For HPA employees or contractors or other third parties operating in the Hutchison Ports Sydney Rail Siding under the definition of Rail Safety Worker the accepted breath alcohol level is 0.00%. If a rail worker produces a blood/alcohol content greater than 0.00% but less than 0.02% the worker will be allowed to return to work outside the Hutchison Ports Sydney Rail Siding.[42]

[46] Clause 5 of the Drug and Alcohol Policy sets out the drug and alcohol testing procedures and limits. It provides that Hutchison may conduct drug and alcohol testing prior to employment, after incidents, upon reasonable suspicion, after an employee has self-identified as having a drug or alcohol problem, after rehabilitation, and in accordance with HPA random selection procedure for drug and alcohol testing.[43]

[47] In relation to testing after incidents, the Drug and Alcohol Policy provides:

> **Post-accident or Incident -** will be conducted on employees and contractors who have:
> - been involved in an accident/incident involving the operation of equipment (quay crane, shuttle carrier, reachstacker, forklift, utility, ASC/ROS/MROS, EWP, bus or any other piece of machinery) regardless of the incident severity
> - committed or may have committed an act of serious misconduct
> - caused or may have caused an injury to a person while at work
> - committed an act of neglect, carelessness or disregard for safety.[44]

[48] In relation to targeted/random testing, the Drug and Alcohol Policy provides:

> Targeted/Random testing is conducted when an employee has provided a previous positive drug or alcohol test result. The employee shall undergo targeted/random testing for a period of no less than 12 months.[45]

[49] The Drug and Alcohol Policy provides that refusal to undergo a drug and/or alcohol test is treated as a breach of this Policy and will be recorded as a positive test and will lead to disciplinary action, which may include termination of employment.[46]

[50] Clause 6 of the Drug and Alcohol Policy describes the types of disciplinary action which may be required following a positive drug or alcohol test result. In summary, this clause provides as follows:

- Following a non-negative test result, the employee or contractor will be immediately removed from active duties and requested to submit to a confirmation test
- Employees will be provided with a safe means of transport home (if required).

- Employees will initially be suspended without pay pending the finalisation of the confirmation test. The confirmation test results are typically available within 2 business days.
- Where an employee has tested positive to a drug or alcohol test, regardless of the circumstances or reasons for the test, the employee will initially be suspended without pay which applies for the period that the employee is unfit for work due to the alcohol or drugs in their system.
- Following the first positive result from the confirmation test, a written warning may be issued to the employee stating that the behaviour is regarded as serious misconduct and is a breach of this policy and therefore unacceptable. The employee may also be subjected to a monitoring program as determined by the EAP Rehabilitation provider, dependant on the factors identified as the reasons for the positive test.
- Subject to the outcome of any investigation and disciplinary action, any employee who has failed an alcohol or drug test will be encouraged to access rehabilitation and return to work programs to be provided by Hutchison. The employee will be encouraged to seek assistance through the EAP.
- Employees who have tested positive for the first time will be subject to target testing for a period of twelve months.
- Where an employee has tested positive for a second time to a drug or alcohol test, regardless of the circumstances or reasons for the test, the employee will be suspended without pay which applies for the period that the employee is unfit for work due to the alcohol or drugs in their system.
- Following the second positive result from the confirmation test, a final written warning may be issued to the employee stating that the behaviour is regarded as serious misconduct and is a breach of this policy and therefore unacceptable.
- Subject to the outcome of any investigation and disciplinary action, any employee who has failed a second alcohol or drug test will be encouraged to access rehabilitation and return to work programs to be provided by Hutchison. The employee will be encouraged to seek assistance through the EAP.
- Employees who have tested positive for a second time will be subject to target testing monthly for an additional period of twelve months.
- Where an employee has tested positive for a third time to a drug or alcohol test, regardless of the circumstances or reasons for the test, the employee will be suspended without pay. Subject to the outcome of any investigation and disciplinary action, the employee may be subject to termination of employment on the grounds of serious misconduct.[47]

[51] Clause 9 of the Drug and Alcohol Policy deals with record, documentation and reporting requirements. It states that Drug and Alcohol test records conducted for Pre-Employment, Random Testing, Reasonable Cause, Targeted Testing or Employee Request will be kept in the employee's personnel file and that Drug and Alcohol test records conducted following an accident/incident will be kept with the Incident file under restricted conditions. It also states that records of any disciplinary action taken as a result of breaches to this policy will be maintained on the employee's personnel file for the life of the person's employment, as employees are required to be fit for work throughout their employment with Hutchison, and these records may be taken into account in future disciplinary meetings/actions.[48]

Were employees aware that the cutoff level for alcohol was changed from 0.02 to 0.00?

[52] Mr Hancock called a number of witnesses who said they were either unaware of the changes to the Drug and Alcohol Policy in which the cutoff level for alcohol was changed from 0.02 to 0.00 or that Hutchison had not informed them of these changes. The evidence of these witnesses is summarised below.

Mr Michael Samperi

[53] Mr Michael Samperi said that Hutchison failed to provide him with any information about changes to its Drug and Alcohol Policy in which the cutoff level for alcohol was changed from 0.02 to 0.00.[49]

[54] Mr Samperi said that he is aware that a Drug and Alcohol Policy exists, and he recalls a toolbox meeting when employees were informed that when working in the rail corridor of operations, that a stricter version of the policy would be enforced due to state laws of zero tolerance.[50]

[55] Mr Samperi remembers it being stated at the time that if an employee had concerns, there is a breath tester at the front gate to self-test and if an employee is still within the 0.02 limit then maybe alternate duties could be arranged.[51] Mr Samperi does not recall a toolbox meeting where it had been stated that the zero-tolerance policy has been adopted for the entire terminal.[52]

Mr Leigh Bowman

[56] Mr Leigh Bowman has been working for Hutchison ports since July 2014. Mr Bowman said that he had been a team leader on the rail for many years and he was aware that the rail had an alcohol limit of 0.00, and the rest of the terminal was 0.02. He said that the amended policy should have been clear and direct for all employees, and should have been notified to all employees a lot better. If there had been a change to the alcohol limit it would have been tool-boxed and made clear to all employees.[53]

[57] Mr Bowman said that until just recently, the notice board in the lunch area had the alcohol policy posted in it with the alcohol limit of 0.02. Further, the breathalyser at the employees' entrance to the building does not work so employees are not able to test themselves if they think they need to.[54]

[58] Mr Bowman said that Hutchison sends many emails and he believes something as serious as a change in the Drug and Alcohol Policy should have been tool boxed and spoken about regularly leading up to and once the change had occurred, due to the workforce doing shift work and a high possibility of people not knowing of the change.[55]

[59] In response to questions by me during the hearing, Mr Bowman confirmed that:

- Mr Bowman does not have a Hutchison issued mobile phone or email address so work related text messages and emails were received on his personal device and through his personal accounts.

- Mr Bowman does not have his phone with him at work at all times because there are certain operational areas where employees are not allowed to have phones. Even when Mr Bowman is not in those operational areas, he often leaves his phone in his locker but he might have it in his pocket while on a break.
- Mr Bowman can access his personal emails on his phone, but he does not usually spend his breaks looking at work related emails.
- Employees only have access to a computer at work if they work in the office and they need to use the computer for work purposes.[56]

Mr Benjamin Robertson

[60] Mr Benjamin Robertson has worked at Hutchison for many years. He is currently a Shift Coordinator. Mr Robertson said that prior to the termination of Mr Hancock's employment, he was not aware of changes to the Drug and Alcohol Policy which resulted in the acceptable alcohol levels decreasing from 0.02 to 0.00.[57]

[61] Mr Robertson said he is aware that changes to work policies are sometimes sent via email, however, he did not receive an email informing him that the Drug and Alcohol Policy had changed to a zero tolerance for alcohol. Mr Robertson said that if an email was sent to him, he either did not receive it or he received it and did not read it. He does not get an opportunity to catch up on all emails while at work due to other work commitments that happen on a shift-to-shift basis.[58]

[62] Mr Robertson does not recall anyone ever advising of any changes to any policy that Hutchison has emailed to employees at a toolbox meeting. He specifically does not recall any discussions at any toolbox meeting regarding a change to the Drug and Alcohol Policy.[59]

Mr Darren Trimmer

[63] Mr Darren Trimmer has been employed by Hutchison since 24 March 2014. His primary role is a grade 2 Stevedore.[60]

[64] Mr Trimmer said that he was not aware of changes to the Drug and Alcohol Policy which resulted in the acceptable alcohol levels decreasing from 0.02 to 0.00. He said that emails are sent to employees without any explanation or requirement to sign off amendments to policies.[61]

[65] Mr Trimmer said that the way that Hutchison delivers policy changes and updates in general is poor and is hard to keep track of with employees having work and multiple personal emails. He said that any changes to a policy should be received, signed and dated personally to ensure that those impacted are made aware.[62]

Mr Malcolm Dominquez

[66] Mr Malcolm Dominquez has worked at Hutchison for just over 10 years. He is a level 2 Stevedore and performs multiple roles.[63]

[67] Mr Dominquez said that he was not aware that the cut off levels of alcohol had been amended from 0.02 to 0.00.[64]

[68] Mr Dominquez said that he had recently learned of the change and was not made aware personally by management or to his knowledge electronically, as many emails are sent. He believes that if there is a crucial policy change, employees should be made aware of this on shift or in a manner that the workforce is captured to ensure that they are all aware.[65]

Mr Barry McGrath

[69] Mr Barry McGrath has been working at Hutchison Port Botany since 2016. He said that he knows Mr Hancock is of good character, a man who loves his family and friends, and is respected and held in high regard by his fellow workers. Mr Hancock is a very experienced and diligent Stevedore.[66]

[70] In Mr McGrath's opinion, there was a lack of communication from Hutchison regarding the alcohol limit being changed. He said that the amended policy should have been clear and direct for all employees, and consistently reported in toolbox talks across all shifts. Some workers would have been on leave or been in their rostered week off, or off due to being injured.[67]

[71] Mr McGrath said that the breathalyser does not work at the front gate for employees to check themselves if they are concerned about their BAC.[68]

[72] During the hearing, Mr McGrath said that he was aware that the Drug and Alcohol Policy had changed 'through word of mouth' from his colleagues but did not recall being advised directly of this by Hutchison. He said:

> We've got training rooms there at work where if the company wants to capture the whole workforce and inform them – inform them of something of importance is going on, they had the opportunity to bring the dayshift in, for instance, educate them about it, get them to sign off about it, make sure that they get people that are off roster, on compo, not on their row, and then they can encapsulate the whole workforce.[69]

Mr Kerry Farrell

[73] Mr Kerry Farrell is employed as a level one stevedore. Mr Farrell said that he felt it was necessary to write in support of Mr Hancock, and the lack of communication from Hutchison about the change of the cutoff level for alcohol from 0.02 to 0.00.[70]

[74] Mr Farrell said that either he never received an email informing him of the amendment to the Drug and Alcohol Policy, or if he did, he did not read the contents. Mr Farrell said he was never present at a toolbox where the policy was explained or mentioned to employees.[71]

[75] Mr Farrell said that Hutchison constantly floods employees with both relevant and irrelevant information. It is almost impossible for shift workers to keep track of the information, especially when it is sent sometimes to work email accounts and sometimes to personal email accounts.[72]

[76] Mr Farrell provided examples of documents that Hutchison sends to its workforce.[73] Mr Farrell said that Hutchison does not have a sign off policy when making amendments to policies to demonstrate that employees are aware of the amendments and that they understand they are subject to the amended policies.[74] Mr Farrell said that to his knowledge the drug and alcohol bulletin posted in the hallway entrance of the terminal that has been up until the pervious week was what the workforce was to go by. That bulletin said that the cut off level for alcohol was 0.02.[75]

Mr Lachlan Beesley

[77] Mr Lachlan Beesley is an employee of Hutchison and has worked at Hutchison for several years.[76]

[78] Mr Beesley said that prior to the termination of Mr Hancock's employment, Hutchison failed to notify all of its employees that the cutoff limit for alcohol had changed from 0.02 to 0.00. He said he was unaware of the change until after Hutchison terminated Mr Hancock's employment.[77]

[79] Mr Beesley said that he has always been aware of the existence of a drug and alcohol policy, and recalls a toolbox meeting when employees were informed that when working in the rail corridor of operations that a stricter version of the policy would be enforced due to NSW rail safety laws imposing zero tolerance for alcohol in an employee's system.[78]

[80] Mr Beesley remembers being advised at the time that if an employee is rostered for rail duties and had concerns that they may test positive, there is a breath tester at the front gate to self-test and if an employee is still within the 0.02 limit then maybe alternate duties could be arranged.[79]

[81] Mr Beesley does not recall any toolbox meeting where it had been stated that the zero tolerance policy had been adopted for the entire terminal and not just rail operations.[80]

Mr Mark Armeni

[82] Mr Mark Armeni has been an employee of Hutchison for the past 10 years in both the Sydney and Brisbane terminals. Mr Armeni covers multiple roles in the terminal, including team leader, first aider and shuttle driver.[81]

[83] Mr Armeni said he was not aware that the cutoff limit for alcohol had changed from 0.02 to 0.00 under the Drug and Alcohol Policy. He was never advised by management personally on shift or ever acknowledged an email from Hutchison. Mr Armeni said that there is no sign off for policies and because there is laxity in relation to where emails are sent to, this can lead to employees missing critical updates from Hutchison.[82]

[84] During cross-examination, Mr Armeni said that he does not check all emails. If it's something important for work it's usually discussed at a toolbox at work or 'we get sat down'.[83] He went on to say, in response to a question about the email Hutchison sent to all employees attaching the Drug and Alcohol Policy:

> I don't open - I don't open everything from work. Like I have a life outside of work. I know work's important, but, yes, I don't open everything from work, and I don't remember receiving an email about what you're asking me.[84]

Mr Paul Wallington

[85] Mr Paul Wallington has been employed by Hutchison for the last ten years. Mr Wallington's primary role in the terminal is a graded Tower Clerk and he also performs the role of back up Shift Leader/Shift Coordinator as required.[85]

[86] Mr Wallington said that during his employment with Hutchison, there has been an alcohol limit of 0.02 under the Drug and Alcohol Policy. Mr Wallington has been a Health and Safety Representative (HSR) and part of the Work Health and Safety Committee and does not recall the policy changing where employees he represented and supervised were formally advised of the change of the policy and the recognition of the policy recorded. Mr Wallington said that he personally was not made aware of any change in policy.[86]

[87] Mr Wallington has three active email addresses, and the new policy change was never received, reviewed, or acknowledged by him. As an active HSR for many years, he had scrutinised the way changes of policy are delivered by Hutchison via an email. When Mr Wallington was employed by Patrick Stevedores for 17 years, any change in policy was delivered to employees in person, who understood, noted and signed off on the change.[87]

[88] Mr Wallington said that he truly believes that any change of policy, especially one as critical as drug and alcohol, should not be delivered via email as there is no recognition or confirmation these policies are being reviewed and understood. As backup shift leader/shift coordinator, Mr Wallington was not aware that a new policy was in place to be toolboxed to the workforce.[88]

[89] Mr Wallington said that changes to policies are never read out by the shift leaders/shift coordinators at toolbox meetings. The purpose of toolbox meetings from the shift leader/shift coordinator perspective is to advise employees of the shift's operational tasks, positional changes and any relevant safety issues for the immediate shift. Mr Wallington said that as a long term employee, and HSR, he strongly believes that the process of change of policy at Hutchison is not best practice and not delivering the outcome it should with respect to employee awareness, recognition, and understanding.[89]

Evidence tendered by Hutchison

[90] Hutchison produced evidence that:

- Hutchison sent a text message to each of the employees listed above on 16 March 2023 to their personal mobile phone number which stated:

> Dear employee, please note that a copy of the HSEQ 3.19 Drug & Alcohol Policy has been emailed to you for your reference.

- Hutchison sent an email to the personal email address of each of these employees on 16 March 2023 with the subject heading 'HSEQ3.19 Drug & Alcohol Policy' which attached the policy and stated:

> Dear Sydney Employees.
>
> Please find attached a copy of the HSEQ3.19 Drug & Alcohol Policy.
>
> The key changes to this Policy are:
> - Alcohol Free Workplace – the allowable limit for alcohol on all HPA sites is Zero (0.000)% BrAC. Alcohol testing is conducted on breath test only.
> - Drug testing – the procedure remains with Oral Fluid Drug Testing, however if the person being tested is unable to provide an adequate amount of saliva to generate a result (after using 2 fluid testing devices) the person must provide a urine sample for an instant urine screen test. Confirmation testing will still be sent to the laboratory for analysis.
> - Correction of the Australian Standard Reference number: AS/NZS 4760:2019
>
> The Policy has been uploaded to SharePoint. You can access it from the following area:
> [link inserted]

Mr Lawrence Moon

[91] Mr Lawrence Moon is employed by Hutchison in the role of Manager – Health Safety and Quality. On 17 and 19 March 2023, Mr Moon held the position of Shift Manager at the Port Botany Terminal. As Shift Manager, it was Mr Moon's responsibility to conduct the toolbox talks which took place at the start of the morning shift at 6:00 am. In particular, on 17 and 19 March 2023, Mr Moon was required to raise at the toolbox meetings the change to the Drug and Alcohol Policy that had been implemented and communicated to staff by email on 16 March 2023.[90]

[92] Mr Moon prepared toolbox talk documents for his own use which he used at the toolbox meetings which he provided to the Commission.[91] In relation to the document dated 17 March 2023, under the heading 'safety initiatives', the following topics were listed:

- D & A policy update
- Shuttle awareness landing containers onto the correct ASC pads
- Report any damaged imports coming off the vessel, make sure the crew are aware of it before moving away from underhook.[92]

[93] Under the heading 'incidents and hazards', the following topics were listed:
D & A Policy, container handling, reporting damaged imports[93]

[94] Under the heading 'HSE information (anything Health, Safety or Environmentally related)', the following items were listed however there was no information provided next to these items:

> Recent operational developments:
> Planned tasks for the shift:
> Other:[94]

[95] Under the heading 'Allocations/elections', the following items were listed however there was no information provided next to these items:

> Safety Facilitator:
> Chief Warden:
> Warden/s (i.e. Shift Coordinator; Ship TL, Lash TL):
> First Aider:
> Delegate/s:[95]

[96] There was also an attendance sheet at page 2 of the document which stated:

> I, the undersigned, attended this Toolbox Talk on / / and fully understood the topics covered.

However this section was blank and there were no names or dates listed.[96]

[97] The document produced in relation to the Toolbox Talks on 19 March 2023 was in identical terms to the 17 March 2023 document, however it listed the following additional matter under 'safety initiatives:'

> Due to the humid conditions, the machinery windows are fogged, use air to clear before starting operations.[97]

[98] Mr Moon said that with reference to the labour sheets at the Port Botany Terminal and his recollection of the two meetings, he confirmed the following employees who gave evidence on behalf of Mr Hancock were in attendance at one or both of those meetings:

- Mr Hancock
- Mr Beesley
- Mr Bowman
- Mr Samperi
- Mr Farrell
- Mr Dominguez
- Mr McGrath[98]

[99] During his evidence at the hearing, Mr Moon said the purpose of holding toolbox meetings is to update the staff on any operation, relevant operational or safety changes that may be on shift. He said that shift managers may highlight any safety issues that employees need to be aware of and may speak of any changes that are relevant throughout the shift that may take place.[99] Mr Moon said that he would usually take three to four minutes to run a toolbox meeting.[100]

[100] In relation to the changes to the Drug and Alcohol Policy, Mr Moon said that at the toolbox meetings, he updated employees to say there are changes in the policy and that it has now moved to 0 per cent BAC.[101] He said that he spoke briefly of the changes to the policy, but that Hutchison also distributes safety alerts, that highlight the changes in detail which are put on all the desks in the amenities room, available to all employees present on shift.[102] Mr Moon confirmed that these alerts are not personally given to any particular employee.[103]

Previous disciplinary history – Incident on 23 October 2019

[101] On 23 October 2019, Mr Hancock was working with another Stevedore, Mr Frank Sorrentino. Mr Sorrentino was working as a crane driver. Mr Hancock said that he entered a safety cage and Mr Sorrentino positioned him against the container to unlock one faulty twist lock. After Mr Hancock unlocked the container, Mr Sorrentino moved the cage down to the wharf where Mr Hancock unhooked the four safety chains from each corner of the cage. Mr Sorrentino then took the cage up to the storage platform on the crane where he was supposed to do a test lift.[104]

[102] Mr Hancock said that when Mr Sorrentino raised the spreader, the cage lifted from one of its corners. Mr Hancock said that it was apparent that he had inadvertently neglected to remove a chain from one of the corners of the cage. Despite the mistake, Mr Hancock and Mr Sorrentino were able to safely lower the cage back into its intended position. The incident did not result in property damage or personal injury.[105]

[103] Mr Hancock said that the inadvertent lifting of the cage resulted from errors made by both Mr Hancock and Mr Sorrentino. While Mr Hancock missed removing one of the chains, Mr Sorrentino failed to perform a slow test lift when lifting the spreader from the cage. Mr Hancock said that if Mr Sorrentino had slowly raised the spreader as he was supposed to, it would have been immediately apparent that one of the chains was still connected and Mr Hancock could have removed it without the cage being lifted by one of its corners.[106]

[104] Mr Hancock said that after the incident he was informed by the Team Leader, Mr Greg Smith, that Mr Sorrentino had ‘thrown him under the bus’ by claiming that the incident was Mr Hancock’s fault. Mr Smith informed Mr Hancock that Mr Sorrentino had refused to work the remainder of his shift and went home.[107]

[105] Mr Hancock said that he was so upset upon learning that Mr Sorrentino was trying to place all of the blame on him for the incident that Mr Hancock felt like he could not focus enough to safely work the remainder of his shift. He informed Mr Smith that he felt he needed to go home rather than finishing his shift. Mr Smith said that he would let the Shift Manager, Mr Mark Evans, know that Mr Hancock had left for the day. Mr Hancock said that neither Greg Smith or Mark Evans or any other manager ever directed Mr Hancock to get tested for drugs or alcohol.[108]

[106] Mr Smith provided a witness statement and was not required for cross-examination. Mr Smith confirmed that on 23 October 2029, he was the team leader on the vessel on afternoon shift and Mr Hancock and Mr Sorrentino were crane drivers. Mr Smith said just before dinner break at 5:20pm, a container closest to the wharf had one pin locked up and, Mr Emanuel Cachia, Shift Manager, asked them to try and finish this point of work before ‘smoko’ break

commenced. Mr Smith explained that a cage job was required to complete this job to unlock one pin. On completion of this job, a chain was left on the spreader when putting the cage away, resulting in the work cage being lifted and hung by that particular chain, as Mr Hancock had left a chain attached and Mr Sorrentino failed to do a test lift. Mr Smith said that once this was identified, the cage was lowered safely, with no damage to equipment or personnel.[109]

[107] Mr Smith said that they then went on their break at 5:45pm, with Mr Smith and Mr Hancock driving back to the amenities building, and Mr Sorrentino making his own way back to the terminal from the crane. Mr Smith said that Mr Hancock went out for dinner and that Mr Smith remained inside the terminal for smoko and witnessed Mr Sorrentino storm back into the building, screaming and attacking Mr Hancock's waterfront knowledge and capabilities to management and distancing himself from blame. Mr Sorrentino then left the terminal and went home.[110]

[108] When Mr Hancock arrived back to the terminal from smoko, Mr Smith said that he approached him and explained what had happened in his absence. Mr Hancock became visibly upset by the attack by Mr Sorrentino on his skills and the incident. As the shift managers were switching over at this time, Mr Hancock asked Mr Smith to tell the incoming shift manager of Mr Hancock's departure home.[111]

[109] Mr Smith said that Mr Hughes' evidence that 'immediately following the incident', Mr Hancock 'left the Port Botany Terminal and in doing so evaded the 'test' or 'screen' that had to be conducted' is simply untrue. Immediately after the incident, Mr Hancock drove with Mr Smith back to the amenities building. Mr Smith said that at no time was Mr Hancock directed to get drug tested on that day. Mr Cachia was present when the chain had been unattached, and if a drug test was required, under the Drug and Alcohol Policy, Mr Cachia should have made Mr Hancock immediately aware that he was required to get drug tested, and directed him to go directly to the terminal and remain there until he was drug tested. Had a drug test been required, Mr Hancock would not have been permitted to depart for his break.[112]

[110] Mr Hancock said that the following day he received a call when he was driving to work from a Hutchison manager. Mr Hancock does not recall if it was Mr Jarrod Graham (then Senior Manager of Operations) or Mr Hughes. Mr Hancock said that he was told not to come to work because he was being accused of refusing to take a drug test after the work cage incident. Mr Hancock informed the manager that he had not been directed to take a drug test and that, had a manager directed him to get tested, he would have. Before ending the conversation, Mr Hancock offered to take a drug test when he arrived at work. This request was refused and Mr Hancock was told that he would not be permitted to work that day and that he would be contacted to set up a meeting to discuss the matter.[113]

[111] Mr Hancock said that he is aware that Mr Sorrentino did not get drug tested and that he was permitted to attend work the following day and suffered no negative consequences for failing to get drug tested for the work cage incident.[114]

[112] Mr Hancock subsequently attended a meeting with Mr Graham and Mr Hughes who, at the time, was Hutchison's HR and training manager. Mr Hancock attended the meeting with Mr Paul Wallington, a colleague and fellow MUA delegate. The meeting centred almost exclusively on the work cage incident and the fact that Mr Hancock had failed to put on a safety

harness before entering the cage alone, and inadvertently left one of the safety chains attached to the cage. Mr Hancock said that he took full responsibility for his role in the incident and assured Mr Graham and Mr Hughes that he would not make the same errors in the future.[115]

[113] Mr Hancock said that the issue relating to the drug test was touched on only briefly. Mr Hancock said that he pointed out to Mr Graham and Mr Hughes that the Drug and Alcohol Policy requires a manager to ensure that an employee is immediately relieved of their duties when a drug and alcohol test is required, and to immediately isolate the employee and keep them under supervision until the drug tester arrives on-site. Mr Hancock explained that the shift supervisor did not relieve him of his duties, and made no attempt to stop him from going to 'smoko'. Mr Hancock told Mr Graham and Mr Hughes that he informed the Team Leader that he was leaving for the day, and that neither the Team Leader nor the Shift Manager said anything about needing to get tested for alcohol or drugs. Mr Hancock also told Mr Graham and Mr Hughes that it is management's obligation to direct him to get tested and that he has no obligation to seek out a drug test.[116]

[114] Mr Hancock said that as neither Mr Graham or Mr Hughes challenged his assertions that he had not been directed to get tested for alcohol or drugs, and that as he had no responsibility to arrange for a test on his own, he believed that they accepted that he had not refused to undergo drug and alcohol testing.[117]

[115] On 1 November 2019, Mr Graham issued Mr Hancock with a final written warning letter. The letter informed Mr Hancock that he was suspended for two weeks. The letter relevantly stated:

> This letter is to confirm that as an alternative to termination of employment you are being issued with a Final Written Warning on the basis that you have engaged in misconduct and breach of Company Policy on 23 October 2019 by deliberately and wilfully entering the work cage alone and failing to wear a safety harness. You also caused a dangerous and uncontrolled lift by failing to unlatch the safety chain from the spreader.[118]

[116] The letter referred to Mr Hancock failing to submit to a mandatory post incident drug and alcohol screen. In addition to the suspension, Mr Hancock was subject to target testing for drugs and alcohol for a period of twelve months.[119]

[117] Mr Hancock said that he believed that the issuing of the final written warning and the suspension was excessive and unfair. The work cage incident did not result in injury or damage to any property or machinery. Mr Hancock said he was aware of several other similar safety breaches committed by his co-workers that resulted in no discipline or, at most, a written warning. Moreover, Mr Hancock said he did not understand how he could be disciplined for failing to take a drug and alcohol test when nobody directed him to get tested.[120]

[118] Mr Hughes' evidence was that one of the issues that formed the basis for the 1 November 2019 Final Warning related to Mr Hancock 's refusal to submit to a 'test' or 'screen' following the workplace incident. Mr Hughes said that from his involvement in the interviews with Mr Hancock, it was established that Mr Hancock, immediately following the incident left the Port Botany Terminal and in doing so evaded the 'test' or 'screen' that had to be conducted. Mr

Hughes recalled that the other employee involved in the incident remained at the Port Botany Terminal and undertook a post-incident test.[121] Mr Hughes said that it was his recollection that the decision in relation to Mr Sorrentino's contribution to the incident was determined by the Shift Manager, Mr Cachia, and that his decision was to the effect that Mr Sorrentino did not contribute to the incident.[122]

[119] In cross-examination, Mr Hughes said that he assumed that the shift manager or operations manager at the time directed Mr Hancock to get drug tested about the incident.[123] In response to questioning that Mr Hughes did not know if somebody actually told Mr Hancock to get tested, Mr Hughes said,

> Yes, it was Hutchison Ports operational management team. I don't recall the specific person off the top of my head.[124]

[120] Later in cross-examination, Mr Hughes agreed that no shift manager or shift supervisor directed Mr Hancock to get tested after the work cage incident and said he 'believed they were deprived of that opportunity'.[125] Mr Hughes went on to explain that:

- The incident should have triggered a test for Mr Smith, Mr Hancock and Mr Sorrentino[126]
- At the time that Mr Cachia gave permission to Mr Sorrentino to leave the terminal, Mr Cachia was not aware of the seriousness of the incident when reviewing the CCTV footage to see what happened[127]
- Mr Cachia then called the testers in, spoke to Greg Smith who was the team leader and the only person remaining on site at that point in time. After that, Mr Hancock returned to the terminal, spoke to Greg Smith and immediately turned around and left.[128]

[121] On 7 November 2019, Mr Hancock lodged a grievance pursuant to the grievance procedure contained in the Enterprise Agreement that was in place at the time because Mr Hancock believed that the Final Warning and suspension were unfair and wholly disproportionate to anything he had done.[129]

[122] On 15 November 2019, Mr Hughes responded to Mr Hancock's grievance on behalf of Hutchison. In his response, Mr Hughes asserted that the disciplinary outcome was 'consistent with past practice'. Mr Hughes referred to the discipline only as being given in response to 'the safety breaches'. He did not in his email suggest that Mr Hancock had been disciplined for breaching the Drug and Alcohol Policy. In response to Mr Hughes' email, Paul Keating, MUA's Sydney Branch Deputy Secretary at the time, emailed Mr Hughes and sought a meeting with Hutchison to address the matter. As far as Mr Hancock is aware, Mr Hughes did not respond to Mr Keating's email and a meeting did not take place.[130]

[123] In his witness statement, Mr Hancock described an almost identical incident that occurred approximately three months later and provided a photo. Mr Hancock said the following employees were involved in the incident:

- Chris Smith, Crane Driver
- Ryan Agwin, Down Crane Driver
- Phil Way, Shuttle Driver
- Mathew Hunter, Team Leader

- Manny Cachia, Supervisor [131]

[124] Mr Hancock said that the only employees who were directed to get drug tested following the incident were Mr Smith and Mr Agwin and that they were drug tested one or two days after the incident. Mr Hancock said that it was his understanding that none of the employees involved in this incident were disciplined for breaches of safety or any other policies.[132]

[125] In relation to this matter, Mr Hughes said he was not aware of this incident but that he had reviewed the records of Hutchison and noted that Mr Agwin and Mr Way were tested on the day of the incident and tested negative.[133] However, Mr Hughes attached two records in relation to Mr Agwin but no records in relation to Mr Way. Mr Hughes said that a safety incident investigation occurred but he was not involved in this incident so he cannot ascertain precisely whether the causal factors were identical to the incident in 2019 involving Mr Hancock. Mr Hughes could see no reference in Hutchison's records to either employee failing to wear the safety harness nor failing to submit to post-incident testing.[134]

[126] In response to Mr Hughes' evidence, Mr Chris Smith, Mr Ryan Angwin and Mr Phil Way all filed witness statements and were not required for cross-examination.

[127] Mr Smith explained that on 29 April 2020 he was rostered as a crane driver to a vessel gang along with Mr Ryan Angwin as the second driver. Mr Way explained that he was performing a pin man job under the crane which involved Mr Angwin and Mr Way being inside the cage and Mr Smith being the crane driver. Mr Smith explained that at approximately 5:20am, an incident occurred where one chain was left attached, leaving the spreader and the work cage connected. Mr Smith took a lift and quickly realised the cage was attached and was left hanging in the air. On instruction of the down crane driver, the cage was lowered to safety with no damage to any equipment or person, and the chain was removed.[135]

[128] Mr Way said that an incident like this rarely causes damage and can be quite common. At the completion of the shift, he, Mr Smith and Angwin all went home and no one directed any of them to submit to drug and alcohol testing.[136]

[129] Mr Angwin confirmed that no one directed them to get drug tested and that he was drug tested at 11:22pm on 30 April 2020 which was his next rostered shift.[137]

[130] Mr Smith's next shift was not until 2 May 2020. When he arrived to work on afternoon shift, Mr Smith was instructed by management to complete a drug and alcohol screening due to the incident three days earlier. The test was completed and came back negative. Mr Smith noted that Mr Hughes failed to acknowledge in his witness statement that Mr Smith was involved in the incident, and tested for drugs and alcohol as a result of it.[138]

[131] Mr Way said that contrary to what Mr Hughes wrote in his witness statement, he was never asked or directed by management to submit to drug or alcohol testing as a result of the incident.[139]

[132] Mr Angwin said that Mr Hughes was incorrect in stating that the incident occurred on 30 April 2020 as it in fact occurred on 29 April 2020 and Mr Angwin was not tested then but on the following shift.[140]

Previous disciplinary history – Incident on 26 January 2020

[133] On 26 January 2020, Mr Hancock was rostered to work an evening shift. Mr Hancock's partner, Ms Hannah Matthewson, and her sister are also Stevedores employed by Hutchison. The three of them left the premises at lunch time in Ms Matthewson's car to get some food. On their way back to work they were rear-ended by another vehicle and Ms Matthewson rang the police. Ms Matthewson then called in to work and left a message explaining the situation and informing Hutchison that they may be late returning from their meal break. They were about ten minutes late returning to work.[141]

[134] When they returned to work, Mr Hancock could see that one of his colleagues and fellow MUA delegate, Mr Kreger, was having an animated conversation with the shift manager, Mr Damien O'Donnell. Mr Hancock said that Mr Kreger and Mr O'Donnell were away from him but he overheard Mr Kreger say to Mr O'Donnell words to the following effect:

> He wasn't even on site and you have no right to target him for testing . . . it's a matter of principle, Damien, and he's not doing it . . . we can take this up with the safety committee.[142]

[135] When he asked what was going on, Mr Kreger informed Mr Hancock that a manager, Mr Cachia, had intercepted the message that Ms Matthewson had left advising Hutchison that they had been rear-ended by another car. Mr Cacia called Mr O'Donnell and told him to have Mr Hancock drug tested. Mr Cacia was not working that day and Mr Hancock did not have any dealings with him.[143] At the end of his conversation with Mr Kreger, Mr O'Donnell told everyone to get back to work. Mr Hancock said that he did not receive a direction to get drug tested from Mr O'Donnell or any other manager. Mr Hancock finished his shift that day and worked an entire shift the following day as well. Mr Hancock said that nobody said anything about a drug test or alleged that Mr Hancock had refused to take a drug test.[144]

[136] At about midday on 29 January 2020, Mr Hughes called Mr Hancock and informed him that he was suspended, effective immediately, for refusing a manager's direction to get drug tested on 26 January 2020. Mr Hancock told Mr Hughes that nobody had directed him to take a drug and alcohol test so he could not have refused such a direction. Mr Graham sent Mr Hancock a letter confirming that he was suspended and directing Mr Hancock to attend a meeting on 31 January 2020. In the letter, Mr Graham wrote:

> As you are aware, you refused to participate in the target drug and alcohol test as directed by the Manager on shift on Sunday, 26 January 2020.[145]

[137] Mr Hancock attended the meeting on 31 January 2020 along with Mr Paul McAleer, who was then the Divisional Branch Secretary of the Sydney Branch of the MUA, Mr Kreger, and another MUA delegate, Mr Simon Euers. Mr Hancock said he explained exactly what happened on 26 January 2020. Mr Hancock said he stressed that nobody directed him to get tested for drugs and alcohol and that if he been directed to do so, he would have been tested. Mr Hancock said that Mr Kreger confirmed his version of events at the meeting.[146]

[138] On 6 February 2020, Mr Graham sent Mr Hancock another letter which alleged that Mr Hancock said the following at the meeting on 31 January 2020:

> • He would not undergo a target drug and alcohol test as he was advised by Mr Kreger that there was an agreement between the company and the WHS Committee that target testing would not be carried out at the same time as random testing;
> • He was aware that he was required to undergo a target drug and alcohol test on 26 January 2020; and
> • He communicated to the Shift Manager that he would not undergo a target drug and alcohol test as he had not received a Written Warning letter stating that he was subject to target testing.[147]

[139] Mr Hancock said that Mr Graham's version of what he said at the meeting on 31 January 2020 was untrue. Mr Hancock said that he never told anyone that he would not submit to drug and alcohol testing. Mr Hancock said that had he done so, he would have been suspended on the spot and would not have been allowed to continue working.[148]

[140] Mr Hancock said that at the meeting, Mr Kreger informed Mr Graham that he had told the Shift Manager that there was an agreement between Hutchison and the WHS Committee that target testing would not be carried out at the same time as random testing. Mr Hancock said that he was not involved in the conversation between Mr Kreger and the Shift Manager, but if the Shift Manager had directed Mr Hancock to get tested, he would have done so. Mr Hancock said he was unable to secure a witness statement from Mr Kreger to corroborate his statement because he died tragically on 1 April 2024.[149]

[141] Mr Hancock said he attended another meeting with Mr Graham on 10 February 2020. At the meeting, Mr Graham suggested that he was going to terminate Mr Hancock's employment. Mr Hancock said that at the meeting Mr McAleer accused the company of falsely targeting him because he was a lead MUA delegate.[150]

[142] Later that day Mr Graham sent an email to Mr McAleer in which he proposed a disciplinary outcome in lieu of the termination of Mr Hancock' employment, including the following:

> • A formal finding of misconduct including breach of company policy;
> • The issuing of a further Final Written Warning;
> • An agreed period of leave without pay of 20 weeks which will be described as a Suspension;
> • Re-grading from Level 4 appointment to Level 2 with a new salary of $115,018.64;
> • An acknowledgment that, upon Mr Hancock's return to work, he will no longer be allocated nor regarded as a Level 4 Team Leader but will have the possibility in the future to re-apply after 12 months following his return;
> • A commitment to re-training upon his return to work; and
> • The support of the MUA to encourage Mr Hancock to accept each of the above.[151]

[143] In the email Mr Graham suggested that, if Mr Hancock and the MUA refused to accept these conditions. Mr Hancock would be summarily dismissed.[152]

[144] In response to Mr Graham's email, the MUA lodged a dispute in the Commission which also raised objections about the warning issued on 1 November 2019. The dispute was listed for a conference before Deputy President Bull in matter C2020/829. The matter was not resolved at conciliation. In the following weeks Mr Paddy Crumlin, the National Secretary of the MUA since 2000, and Mr John Willy, Hutchison's Chief Executive Officer, attempted to resolve the dispute. Through that process, Hutchison offered the following disciplinary outcome if the MUA agreed to discontinue its dispute:

- 12-week suspension;
- Further final written warning dated the day of the alleged breach of company policy;
- Regrading to Level 3 from Level 4;
- Loss of Team Leader skill for 12 months; and
- A commitment from Mr Hancock to undertake retraining upon his return to work.[153]

[145] Mr Hancock said he felt like he was stuck between a rock and a hard place. On the one hand, he knew that he had never refused a direction to get tested for drugs and alcohol and he thought that if he continued to fight to prove himself innocent of the allegations, justice would eventually prevail.[154]

[146] Mr Hancock said that on the other hand, he understood that he needed his job to pay his bills and maintain his standard of living. If he lost his job, he was certain that he would not be able to secure another job that paid him anywhere near the salary that he was earning at Hutchison.[155]

[147] Mr Hancock said that in the end, under extreme duress, on 24 February 2020, he authorised the MUA to agree to the disciplinary outcome proposed by Hutchison in exchange for the MUA withdrawing the dispute that it filed on Mr Hancock's behalf. Mr Hancock advised Mr McAleer that he would not agree that he had ever refused a direction to get tested for drugs or alcohol, and he would not sign any document saying that he had done anything wrong.[156]

[148] On 24 February 2020 Mr McAleer sent an email to Mr Willy which relevantly provided:

> I write on behalf of the MUA Sydney Branch in responding to issues related to Craig Hancock based on what I understand to be the outcome of discussions that have occurred at a senior level between yourself and Paddy Crumlin.
>
> For the record, I could not be more disappointed with how the Company have handled this issue.
>
> Jarrod Graham agreed with me after seeking your approval along with Harriet Mihalopolous to discipline Craig Hancock in a minor way, not including suspension on the basis of the Union withdrawing the protected strike action against Hutchison. This was in addition to the Company agreeing to the rosters for every Hutchison employee in Sydney.
>
> After going to a further meeting after we pulled the strike action the Company deceitfully and disingenuously reneged on the deal and found that Craig had in fact refused a drug and alcohol test. This is despite not being able to provide on either of the

> alleged occasions the manager who requested the drug and alcohol test to Craig directly or the manager or supervisor that Craig had apparently refused the test to. Craig also worked the rest of the shift as well as the shift on the following day, which is a breach of your policy itself, everyone is aware that employees are immediately stood down if they refuse a test. I wonder who in management will be disciplined for such heinous breaches of the Company's policies.
>
> It has also been reported to me that it is common knowledge that you yourself have not undertaken a test when your name has been pulled out of the randomiser on two occasions, another example of one rule for some and not others.
>
> Craig has accepted the Unions advice that it is bordering on impossible to be reemployed after a termination, even if it is found to be an unfair or unlawful one. The fact that the Company threatened myself and Craig Hancock into accepting the outcome or termination would be reconsidered is an unwarranted attack and is condemned in the strongest possible terms.
>
> On this basis, Craig Hancock accepts the following:
> - 12 week suspension to commence in two weeks time. Craig was to be on leave this week paid through a previous agreement with Jarrod Graham and he is on his Rostered Week Off next week which he has earnt by working overtime during the 7x1 roster period.
> - Further final written warning dated the day of the alleged breach of company policy
> - Regrading to Level 3 from Level 4
> - Loss of Team Leader skill for 12 months
> - Craig's commitment to retraining upon return to work
>
> Upon confirmation the MUA Sydney Branch will withdraw the dispute notice that we have filed in Fair Work Australia.[157]

[149] Mr Hancock returned to work from his suspension on 1 June 2020. During 2020 Hutchison directed Mr Hancock to get tested for drugs and alcohol approximately 20 times. On one day he was directed to get tested two times in less than an hour.[158]

Previous disciplinary history – Not related to the Drug and Alcohol Policy

[150] In his evidence, Mr Hughes referred to the following four matters involving Mr Hancock which were not related to the Drug and Alcohol Policy:

1. A letter dated 27 July 2023 to Mr Hancock clarifying expectations about an 'Absence Management Plan' with respect to the submission of medical certificates.
2. A letter dated 8 June 2023 to Mr Hancock advising that he would be on an 'Absence Management Plan' because he used more than 13 Personal Leave days over the past 12 months.
3. A Final Written Warning issued on 5 June 2023 in relation to unauthorised leave.
4. A Final Warning issued on 9 June 2015.

Absence Management Plan

[151] The correspondence dated 8 June 2023 and 27 July 2023 related to Hutchison requiring Mr Hancock to submit medical certificates for personal leave because he had taken 13 days of personal leave in one year.[159] During the hearing, Mr Hancock explained that he had been experiencing depression at that time.[160] On 24 July 2023, Mr Hancock was required to attend a formal meeting because he had not produced a medical certificate in relation to a recent absence. During the meeting, Mr Hancock produced the certificate and explained that he had forgotten to send it to HR. The letter of 27 July 2023 reminded him of the requirement to submit medical certificates in relation to personal leave.[161]

Final Written Warning dated 5 June 2023

[152] The Final Written Warning dated 5 June 2023 appears to have been issued 'as an alternative to termination of employment' because Mr Hancock was on unauthorised leave for first shift 1 May 2023 and first shift 2 May 2023.

[153] The letter stated,

> In particular, we were concerned about the fact that you knowingly represented to us that you would be available for allocation in the period first shift 1 May 2023 to 7 May 2023 and it was never your intention to return from leave and work your allocated shifts.

[154] The letter noted that Hutchison management was concerned that Mr Hancock was not being truthful during the disciplinary meeting, but that they 'could not make a factual finding about this matter.'

[155] Mr Hancock explained in re-examination that there was insufficient work at Port Botany Terminal so to avoid redundancy, Mr Hancock and a number of his colleagues obtained work at Barrow Island for eight weeks. They filled out leave forms for this eight week period and were permitted to split the leave between a rostered week off, annual leave, and leave without pay. While Mr Hancock was away in Barrow Island, he reviewed the leave form and noted that there was one day that he did not record as leave. Mr Hancock said that he noticed this two weeks before he was due to be allocated his next shifts at Hutchison and sent emails to both Mr Hughes and Mr Luke Barron, HR Operations but did not receive a response. He then rang up the allocators and said, 'Sorry, I didn't do that one day, please don't roster me on. Don't pay me. My mistake'. Mr Hancock was then rostered on the day in respect of which he had not applied for leave. He said he rang the allocators again and said, 'I'm over in Barrow Island, I will not be back until that night'. He explained that the leave form was complicated with splitting leave and leave without pay. Mr Hancock said he spoke to Mr Barron after the disciplinary meeting and Mr Barron said in relation to the warning letter, 'Don't worry about it, that's just company policy'.[162]

Final Warning issued on 9 June 2015

[156] The Final Warning issued on 9 June 2015 appeared to be issued in relation to 'action' taken by staff members on 7 May 2015 about a reduction in crane drivers that night. The letter refers to workplace health and safety concerns and withdrawal of labour. Neither party provided any evidence about the circumstances of the issuing of this warning.[163]

Hutchison's evidence in relation to Mr Hancock's claim for reinstatement

Mr Hughes

[157] Mr Hughes said that having regard to the circumstances of Mr Hancock's behaviour and the unique nature of the work performed at the Port Botany Terminal, he does not have the necessary level of trust and confidence in Mr Hancock.[164]

[158] Mr Hughes pointed out that prior to his elevation to management, he worked as a stevedore for over 19 years. He has performed Mr Hancock's role and appreciates its demands and requirements as a team member. Stevedores work in small teams or gangs, moving large steel containers that weigh as much as 28 tonnes from significant heights using machinery and equipment that moves at speed. This carries with it the inherent risk that workers can be seriously injured. The role requires great skill, attention and concentration but most importantly trust. Each employee needs to know that everyone on shift arrives fresh, attentive and not in any way subject to any drug or alcohol that may detract from their full and undivided attention and skill.[165]

[159] Mr Hughes said that Hutchison's policies and those across the industry reinforce the need to attend work free from any influence of drug or alcohol and send a very firm and unambiguous message that each employee has a personal responsibility not to take drugs or consume alcohol and attend the workplace. The personal responsibility is paramount and very much focused on the need for teams to commit to this requirement and in doing so developing and maintaining trust in each other.[166]

[160] Mr Hughes said that there must be consequences for employees who are not prepared to take the personal responsibility to refrain from behaviours that will or may result in breach. The risk is simply too great to themselves and their teammates. Mr Hughes considered that Mr Hancock was provided with multiple opportunities to ensure his compliance with the policy including a lengthy suspension and that Mr Hancock has demonstrated in his most recent conduct an unwillingness to properly comply with the safety critical policy of his employer.[167]

[161] Mr Hughes feels that Mr Hancock was not prepared to apply this discipline to his behaviour prior to his shift commencing and that his non observance of the policy required the sanction of termination. If Hutchison is to operate safely at the Port Botany Terminal, its policies must be respected and adhered to at all times. Mr Hughes is not at all trusting of Mr Hancock. He has no confidence that Mr Hancock respects the policies of Hutchison. Mr Hancock's return to work would significantly undermine a policy which must be adhered to and respected if Hutchison is to operate safely.[168]

Mr Stockdale

[162] Mr Stockdale said that for the Port Botany Terminal to operate safely and effectively, it is essential that the workforce comply in full with its policies. Policies that relate to and support a culture of workplace safety are for the benefit of all workplace participants. In a team based environment each employee needs to be assured that the person working beside them is not under the influence of drugs or alcohol. The Drug and Alcohol Policy is and remains

fundamental to safety and the 0.00 BAC requirement must be respected and adhered to by all employees.[169]

[163] Mr Stockdale said that he believed Mr Hancock's actions were deliberate and knowing and that if Mr Hancock is reinstated, this would undermine a policy which is essential to the operation of the Port Botany site.[170]

Mr Moon

[164] During the hearing, Mr Moon said that Mr Hancock was a good crane operator, that he did not have any issues with him and that he would have no problem managing him again.[171]

When can the Commission order a remedy for unfair dismissal?

[165] Section 390 of the FW Act provides that the Commission may order a remedy if:

(a) the Commission is satisfied that the person was protected from unfair dismissal at the time of being dismissed; and

(b) the person has been unfairly dismissed.

[166] Both limbs must be satisfied. I am therefore required to consider whether Mr Hancock was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that Mr Hancock was so protected, whether Mr Hancock has been unfairly dismissed.

When has a person been unfairly dismissed?

[167] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

Initial matters

[168] A threshold issue to determine is whether Mr Hancock has been dismissed from his employment.

[169] There was no dispute and I find that Mr Hancock's employment with Hutchison was terminated at the initiative of Hutchison. I am therefore satisfied that Mr Hancock has been dismissed within the meaning of s.385 of the FW Act.

[170] Under s.396 of the FW Act, the Commission is obliged to decide the following matters before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;

(d) whether the dismissal was a case of genuine redundancy.

[171] I have decided these matters below.

[172] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[173] Both parties submitted that the termination took effect on 2 May 2024. It is not disputed, and I find, that Mr Hancock made the application on 17 May 2024. I am therefore satisfied that the application was made within the period required in s.394(2).

[174] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

(a) the person is an employee who has completed a period of employment with his or his employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[175] It was not in dispute, and I find, that at the time of dismissal, Mr Hancock completed at least the minimum period of employment with Hutchison, and that an enterprise agreement applied to Mr Hancock in relation to the employment.

[176] I am therefore satisfied that, at the time of dismissal, Mr Hancock was a person protected from unfair dismissal.

[177] It was not in dispute, and I find, that Mr Hancock's dismissal was not a case of genuine redundancy and that the Small Business Fair Dismissal Code does not apply.

[178] Having considered each of the initial matters, I am required to consider the merits of the application.

Was the dismissal harsh, unjust or unreasonable?

[179] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
>
> (b) whether the person was notified of that reason; and
>
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
>
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
>
> (e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and
>
> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (h) any other matters that the FWC considers relevant.

[180] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[172]

[181] I set out my consideration of each of these criteria below.

Was there a valid reason for the dismissal related to Mr Hancock's capacity or conduct?

[182] In *Sydney Trains v Gary Hilder*[173](Hilder) the Full Bench summarised the well-established principles applicable to the consideration required under s 387(a) as follows:

> (1) A valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced.
> (2) When the reason for termination is based on the misconduct of the employee the Commission must, if it is in issue in the proceedings, determine whether the conduct occurred and what it involved.
> (3) A reason would be valid because the conduct occurred and it justified termination. There would not be a valid reason for termination because the conduct did not occur or

> it did occur but did not justify termination (because, for example, it involved a trivial misdemeanour).
> (4) For the purposes of s 387(a) it is not necessary to demonstrate misconduct sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee's dismissal (although established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).
> (5) Whether an employee's conduct amounted to misconduct serious enough to give rise to the right to summary dismissal under the terms of the employee's contract of employment is not relevant to the determination of whether there was a valid reason for dismissal pursuant to s 387(a).
> (6) The existence of a valid reason to dismiss is not assessed by reference to a legal right to terminate a contract of employment.
> (7) The criterion for a valid reason is not whether serious misconduct as defined in reg 1.07 has occurred, since reg 1.07 has no application to s 387(a).
> (8) An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal for the purposes of s 387(a) will be a relevant matter under s 387(h). In that context the issue is whether dismissal was a proportionate response to the conduct in question.
> (9) Matters raised in mitigation of misconduct which has been found to have occurred are not to be brought into account in relation to the specific consideration of valid reason under s 387(a) but rather under s 387(h) as part of the overall consideration of whether the dismissal is harsh, unjust or unreasonable.[174]

Submissions

Mr Hanock

[183] Mr Hancock submitted that there was no valid reason for the termination because the Drug and Alcohol Policy provides that an employee can only be terminated for a third breach of the policy. The first two alleged breaches resulted from Hutchison's assertion that Mr Hancock refused a direction to get tested. However, no manager ever directed Mr Hancock to get tested. Therefore, he could not have refused a direction to get tested so the alleged breaches should be considered null and void.

[184] Mr Hancock submitted that Hutchison failed to notify Mr Hancock and other employees that it had amended the Drug and Alcohol Policy. Therefore, the applicable policy was one which provided that, if a confirmatory test is less than 0.02, the test is considered negative, and the employee is to receive no discipline. The confirmatory test resulted in a 0.017 reading. There was no valid reason for the termination because Mr Hancock did not breach the policy even once, let alone three times.

Hutchison

[185] Hutchison submitted that there was a valid reason for the dismissal which related to the conduct of Mr Hancock on 31 March 2024. Mr Hancock engaged in misconduct. Hutchison submitted that Mr Hancock's conduct materially impacted upon the safety and welfare of other employees at the Port Botany Terminal.

[186] Hutchison submitted that the Commission would have no difficulty in accepting that the dismissal was sound, defensible and well founded. Hutchison submitted that the attempts by Mr Hancock to frame the dismissal as some sort of retribution for his alleged prior services as a delegate of the union were rejected by Mr Hughes and not put to Mr Stockdale. Mr Hughes was aware of Mr Hancock's history of warnings and was a participant in the decision making process to amend the Drug and Alcohol Policy in March 2023. There is no evidence of Mr Hughes acting in a manner which could be described as capricious, fanciful, spiteful or prejudiced. Hutchison submitted that Mr Hancock's conduct was far from trivial and that he knowingly chose to breach the policies of Hutchison.

Findings

[187] Mr Hancock's submissions proceed on the basis that it was not possible for him to be in breach of the Drug and Alcohol Policy on 31 March 2024 because Hutchison had not taken reasonable steps to ensure that he was aware of changes to the Drug and Alcohol Policy which resulted in the cut off level for alcohol being reduced from 0.02 to 0.00 in March 2023. Mr Hancock submitted that the confirmatory test result was below the cut off level for alcohol in the Drug and Alcohol Policy which he reasonably believed applied at the time. Therefore, Mr Hancock contends that there was no breach of the applicable policy and no valid reason for the dismissal.

[188] Alternatively, Mr Hancock submits that if I find that he breached the Drug and Alcohol Policy by recording a test result higher than 0.00, there is no valid reason for dismissal as the Drug and Alcohol Policy requires two previous breaches of the policy before a dismissal can occur. Mr Hancock contends that there is no basis to conclude that two previous breaches of the Drug and Alcohol Policy occurred, although Hutchison has issued Mr Hancock with warnings in relation to the Drug and Alcohol Policy on two prior occasions. This is because the warnings relate to Mr Hancock allegedly refusing to undergo a drug and alcohol test on two occasions in circumstances where Hutchison is unable to establish that any manager gave Mr Hancock such a direction.

[189] There is no dispute between the parties that the Drug and Alcohol Policy was amended in March 2023 to reduce in the cut off level for alcohol from 0.02 to 0.00 and that in recording a result of 0.017, Mr Hancock was in breach of the Drug and Alcohol Policy. There were also no submissions made by Mr Hancock that the Drug and Alcohol Policy was unlawful and/or unreasonable.

[190] Full Benches of this Commission have previously considered whether the dismissal of an employee following breach of an employer's drug and alcohol policy is unfair in *Harbour City Ferries Pty Ltd v Christopher Toms*,[175] *Owen Sharp v BCS Infrastructure Support Pty Limited*[176] and Hilder. The recent Full Bench decision in *Sydney Trains v Reece Goodsell*,[177] distilled a number of principles from these decisions relevant to the present case including the following:

> [115] ….cases where an employer asserts that the reason for a dismissal included that an employee was impaired at work, or there was a risk that the employee was impaired at work or that there was a risk that the employee would attend work under an

> impairment at a future time, will generally fall for consideration under s. 387(a) in relation to whether impairment or present or future risk of impairment, is a valid reason for dismissal. In such cases the Commission will be required to determine whether the conduct occurred or the belief that it would occur in the future, is sound, defensible, well-founded, and therefore a valid reason for dismissal.
>
> [116] …where breach of a lawful and reasonable drug and alcohol policy is the reason for dismissal, the Commission must consider whether the breach simpliciter is of sufficient gravity to constitute a sound, defensible, well-founded, and therefore valid reason for dismissal under s. 387(a). In considering this question, circumstances raised in mitigation relating to the general context in which the breach occurred, or personal to the dismissed employee, are not to be considered for the purposes of mitigating or derogating from the analysis and conclusion in relation to s. 387(a). Personal context may include that the dismissed employee did not display visible signs of impairment, or that there was no intention on the part of the employee to breach the policy, or that the dismissed employee was dealing with personal issues at the relevant time or matters such as the age and employment record of the dismissed employee. General context may include inconsistencies in the application of the policy or its terms, or a lack of understanding at the workplace about an important aspect of the policy, or whether the employer has properly explained the implications of the policy.
>
> [117] Contextual matters cannot derogate from the validity of a reason for dismissal based on a breach simpliciter of a lawful and reasonable policy. This involves a decision making process whereby the validity of a reason for dismissal under s. 387(a) is considered separately from mitigating factors found to be relevant under s. 387(h). All the matters in s. 387 – substantive, procedural and contextual – are then required to be considered and weighed in the overall assessment of whether a dismissal is harsh, unjust or unreasonable. Notwithstanding a finding under s. 387(a) that there was a valid reason for dismissal related to breach of a drug and alcohol policy, it may be reasonably open to the Commission to find that in all the circumstances of a particular case, the dismissal was unfair, when other matters in s. 387 are considered and weighed, including mitigating factors in s. 387(h).[178]

[191] In the case before me, Hutchison did not allege that the reason for dismissal was because Mr Hancock was impaired or there was a risk of impairment but rather that Mr Hancock breached the Drug and Alcohol Policy. Hutchison submitted that regardless of whether Mr Hancock agreed with the two previous warnings in relation to breaches of the Drug and Alcohol Policy, the warnings had not been revoked and still applied, and as such, Hutchison could rely upon these warnings.

[192] I accept that Hutchison took some steps to communicate the changes to the Drug and Alcohol Policy to employees and that the changes were lawful and reasonable having regard to the safety critical environment that Mr Hancock and other employees are working in. If Hutchison had taken no steps at all in this regard, there may be some basis to Mr Hancock's contention that the dismissal was not 'sound, defensible and well-founded'. The matters raised by Mr Hancock regarding his knowledge of the Drug and Alcohol Policy is a matter of 'general context', which, as identified by the Full Bench in *Goodsell*, is not to be considered for the

purposes of mitigating or derogating from the analysis and conclusion in relation to s. 387(a) but may be relevant to my consideration of s.387(h).

[193] I also accept that on a strict reading of the Drug and Alcohol Policy and the two prior letters of warning, that Hutchison was entitled to regard Mr Hancock as having engaged in a third breach of the Drug and Alcohol Policy and that the policy permitted Hutchison to dismiss Mr Hancock in these circumstances. The concerns raised by Mr Hancock about the validity or appropriateness of the previous warning are matters which may be relevant to my consideration of s.387(h), but which do not affect the validity of the dismissal under s.387(a).

[194] On the basis of these findings, I accept that Mr Hancock's conduct on 31 March 2024 in testing above 0.00 for alcohol after being issued warnings for breaching the policy on two previous occasions, was a valid reason for the dismissal, related to Mr Hancock's conduct. This weighs in favour of a conclusion that the dismissal was not unfair.

Was Mr Hancock notified of the valid reason?

[195] Proper consideration of s.387(b) requires a finding to be made as to whether Mr Hancock 'was notified of that reason'. Contextually, the reference to 'that reason' is the valid reason found to exist under s.387(a).[179]

[196] Mr Hancock submitted that he was not properly notified of the reason for his termination at the time he was terminated because the termination letter indicated that Hutchison had considered his disciplinary history, but did not specify what disciplinary history the company considered in determining to terminate his employment.

[197] Hutchison submitted that Mr Hancock was notified of the reasons of his termination as particularised in the letter of termination dated 2 May 2024.

[198] The letter of termination that Hutchison issued to Mr Hancock referred to Mr Hancock's breach of the Drug and Alcohol Policy on 31 March 2024 as well as his disciplinary history, which included previous breaches of the Drug and Alcohol Policy. This indicated that Hutchison took into account Mr Hancock's entire disciplinary history. During the disciplinary meeting on 16 April 2024, Mr Stockdale referred to Mr Hancock's disciplinary history. Mr Hughes referred to Mr Hancock having multiple warnings on file. Mr Hancock was therefore on notice that Hutchison was actively considering his disciplinary history in determining whether it should terminate his employment and could have requested a copy of his disciplinary history during the meeting if he was uncertain what Hutchison was considering. I do not accept that Hutchison was required to set out each component of Mr Hancock's disciplinary history to establish that it notified Mr Hancock of the valid reason for the termination. I find that Hutchison notified Mr Hancock of the valid reason when issuing the letter of termination dated 2 May 2024.

Was Mr Hancock given an opportunity to respond to any reason related to his capacity or conduct?

[199] Mr Hancock submits he was not given an opportunity to respond to the reasons for his termination because he was not given an opportunity to respond to any disciplinary history that Hutchison considered in deciding to terminate his employment.

[200] Hutchison submitted that Mr Hancock was provided with a high level of procedural fairness prior to the dismissal in that he was given an adequate opportunity to respond to the allegations of misconduct and the possibility of the termination of his employment as demonstrated by:

(a) The suspension letter dated 1 April 2024;
(b) The notification of formal Disciplinary Letter issued on 12 April 2024;
(c) Mr Hancock's attendance at a disciplinary meeting on 16 April 2024;
(d) Further negotiations between representatives of the MUA and representatives of management of Hutchison.

[201] As noted above, I have found that Mr Hancock was on notice that Hutchison was actively considering his disciplinary history in determining whether it should terminate his employment. Further, it should have been clear to Mr Hancock that given he had received two previous warnings for breaching the Drug and Alcohol Policy, that the events of 31 March 2024 could be considered a third breach resulting in the termination of his employment. As such, it was reasonable to expect that Hutchison would take into account previous warnings in relation to the Drug and Alcohol Policy. Mr Hancock could have responded to these matters either at the meeting on 16 April 2024 or requested a further meeting, noting that the termination did not occur until 2 May 2024.

[202] Taking into account these matters, I do not accept that Mr Hancock was deprived of an opportunity to respond to any disciplinary history that Hutchison considered in deciding to terminate his employment.

Did Hutchison unreasonably refuse to allow Mr Hancock to have a support person present to assist at discussions relating to the dismissal?

[203] There is no dispute between the parties that Mr Hancock had a support person present at the time his termination was discussed.

Was Mr Hancock warned about unsatisfactory performance before the dismissal?

[204] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

To what degree would the size of Hutchison's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[205] Mr Hancock submitted that Hutchison is a large company and, as such, should comply with appropriate procedures when terminating the employment of employees. Hutchison did not make any submissions about this matter.

To what degree would the absence of dedicated human resource management specialists or expertise in Hutchison's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[206] Mr Hancock submitted that Hutchison has dedicated human resource staff who should ensure compliance with appropriate procedures when terminating the employment of employees. Hutchison did not make any submissions about this matter.

What other matters are relevant?

[207] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant. A number of matters raised by the parties are potentially relevant to my consideration under this provision.
Submissions

[208] Mr Hancock submitted that the dismissal was harsh because:

- It resulted from the company retaliating against him because of his effectiveness as a workplace MUA delegate;

- Hutchison terminated Mr Hancock for allegedly violating a workplace policy of which he was ignorant;

- Alternatively, Hutchison summarily dismissed Mr Hancock for conduct that could not reasonably be considered serious misconduct;

- The penalty of termination was harsh considering Mr Hancock's age and years of service.

[209] Hutchison submitted that it is entirely appropriate that it establishes policies that ensure that employees are not present at work under the influence of alcohol (however small) and to take proportionate disciplinary action for breaches of such policies. If the employer is not able to impose such a sanction, then its ability to prevent employees attending work under the influence of alcohol will correspondingly decrease.

[210] Hutchison submitted that attending work having consumed alcohol must be given significant weight on any assessment of harshness.

[211] Hutchison submitted that Mr Hancock's personal or private circumstances that bear upon the substantive fairness of the dismissal with reference to his historical compliance with the Drug and Alcohol Policy point in the direction of an aggravating factor. On any analysis, Mr Hancock had a poor employment record.

[212] Hutchison submitted that significant weight must be given to the importance of a policy that is related to work health and safety and in particular that is aimed directly at ensuring employees attend work free from the potential impact of alcohol. Mr Hancock arrived at work having consumed alcohol before his shift and had a BAC above 0.00. Weight should also be given to the right of employers being able to enforce such policies.

[213] Hutchison submitted that the broad evaluative judgement as to whether this dismissal was harsh unjust and unreasonable spins on the axis of the employer's policy, and the need to enforce such policies to support the essential need for alertness in a work environment that is potentially dangerous and involves employees operating machinery and plant equipment throughout a shift. Here, the gravity of the misconduct, coupled with the importance of policy, weigh in favour of the dismissal not being harsh unjust or unreasonable.

[214] Hutchison contended that there are no mitigating circumstances or other relevant matters that may properly be taken into account in weighing against the finding that the dismissal was fair and a proportionate response to the misconduct. The degree of seriousness of misconduct was high. The sanction of dismissal was not disproportionate. It was also a proportionate response, particularly with regard to Mr Hancock's work history. Mr Hancock was clearly on notice that any further breach of the Drug and Alcohol Policy would not be tolerated and may result in his dismissal. Mr Hancock worked in an environment that was high risk and performed a role which involved the movement of heavy containers using cranes and other plant and equipment. Being free from the potential impact of alcohol promotes the highest level of situational awareness and compliance with operational procedures introduced to ensure safe operation of plant and machinery. The Drug and Alcohol Policy supports the safe operation of such plant and machinery. It was not suggested that the Drug and Alcohol Policy was unreasonable. Mr Hancock, having been warned, proceeded to contravene the Drug and Alcohol Policy by attending work having consumed alcohol ahead of the shift of 31 March 2024.

[215] Hutchison submitted that Mr Hancock's actions on the day of the incident were deliberate and the Commission should not accept his contention as to ignorance of Hutchison's policies. Consuming alcohol immediately before a shift demonstrates a deliberate disregard for compliance. Mr Hancock's conduct warranted dismissal. Dismissal was not a disproportionate response. The suggestion that Mr Hughes acted out of malice and/or to punish Mr Hancock for his union activities and/or delegate responsibilities should be rejected on the basis of the evidence.

Findings

Seriousness of Mr Hancock's Conduct

[216] I accept that the Drug and Alcohol Policy is an essential component of Hutchison's strategy for managing risk in a dangerous workplace where accidents have the potential to cause damage to property, serious injury and even death. I find that the requirements of the policy are lawful and reasonable and that Mr Hancock's conduct in breaching the policy on 31 March 2024 is a serious matter which weighs in favour of a finding that the dismissal was not unfair.

Did Hutchison take reasonable steps to communicate with employees about the changes to the Policy?

[217] During the hearing, Hutchison appeared to be claiming that the purpose of the change to the Drug and Alcohol Policy was to reconcile the Port Botany Terminal 'rail' and 'non-rail' areas to 0.00. However, this was not Mr Hughes' evidence. Mr Hughes said that the 'rail' areas

were 0.00 because it was a legislative requirement, and that he wanted the 'non-rail' areas to move to 0.00 after becoming aware of two employees consuming alcohol during their meal break.

[218] As noted above, I accept that Hutchison took some steps to communicate the changes to the Drug and Alcohol Policy to employees. In doing so, Hutchison said it followed the communication methods requested by the WHS Committee. There is no evidence that any member of the WHS Committee had a direct conversation with Mr Hancock or any other person outside that Committee about the changes to the Drug and Alcohol Policy and the date that the changes were to take effect.

[219] Initially, Hutchison sent a text message and an email to employees at their personal phone number and email addresses on 16 March 2023. The subject heading of the text message in the email was the name of the Drug and Alcohol Policy. The subject heading of the text message did not give any indication that the Drug and Alcohol Policy had changed. Similarly, the text message simply advised the recipient that a copy of the Drug and Alcohol Policy had been emailed to the employee. The text message did not state that the Drug and Alcohol Policy had changed. I accept that these messages were sent to employees who gave evidence on behalf of Mr Hancock.

[220] This may well have been an appropriate method of ensuring that each employee was able to access the Drug and Alcohol Policy at some time in the future if they wished to refer to it. Presumably the alternative was to provide each employee with a printed hard copy which could be easily misplaced. However, I do not think that this was an appropriate way to communicate such a significant change to the Drug and Alcohol Policy to employees. Firstly, most employees did not have a work email address or phone number so the Drug and Alcohol Policy was sent to their personal accounts. There was no evidence before me about whether Hutchison requires employees to read documents which are sent to their personal email or mobile number. Secondly, the main role of Mr Hancock and other employees who gave evidence was to move containers around the terminal. Although there was evidence of some employees performing clerical or desk based duties, this does not appear to be widespread. The consequence of this is that it is unlikely that employees would have received and read the Drug and Alcohol Policy during the course of their duties. In this regard, I note the evidence that employees were not able to access personal email addresses on the work computers and that there were areas of the workplace that they could not carry their mobile phones.

[221] It may well be appropriate for an employer to inform employees of changes to policies by emailing these to employees if employees have a work email address and usually work at a computer. It would be expected that such employees would receive the changed policy while undertaking their duties and be able to review the policy during their working day. This is to be contrasted to employees like Mr Hancock who would only see an email with a changed policy at work if they happened to be checking their personal emails on their phone during 'downtime' or while on a break. Given Mr Hughes' evidence that there is significant 'down time' on shift, that time could have readily been used by Hutchison to train employees in small groups about changes to policies.

[222] A further issue which arises is that if a person receives a work related email on a personal email account and there is no requirement from their employer that such emails be read and

understood, there is a possibility that the employee will not open the email and leave it 'unread'. This was an outcome which Hutchison appears to have never contemplated as its cross-examination of Mr Hancock and his colleagues proceeded on the assumption that if an employee received an email at their personal email address, this established that the employee would have read the cover email, even if the employee did not click on the attachment. This was the subject of a number of exchanges between Mr Brown and myself, for example:

PN1337

> Mr Brown, sometimes people don't actually click, they leave emails unread, and when I'm hearing witnesses talk about opening emails I'm thinking that they're meaning unread, but you seem to think that they mean not clicking on the attachment. So I'm just a bit concerned that you might be at cross purposes with the witnesses. So I think you actually need to ask them whether they have left the email read or unread. It just seems to me that you've got a particular view about what that means, and I have got a bit of a different view and we just need to clarify what the witness actually means when they talk about opening the email.

PN1338

> MR BROWN: Yes, I will, Deputy President. Our lived experience we get an email and it may or may not have an attachment.

PN1339

> THE DEPUTY PRESIDENT: Yes.

PN1340

> MR BROWN: In this particular case there is the email and there is the attachment, and when I hear the words click on or open up what I'm trying to interrogate them on was did they mean go to the PDF and click onto it.

PN1341

> THE DEPUTY PRESIDENT: I think the thing is that people I think often have different approaches to personal emails compared to work emails. So in a work context you're always opening, everyone's opening up their emails, but in a personal context because people get a lot of spam they will often just leave the emails unread, and I feel that that may be what the witnesses are trying to portray, but your assumption in your questioning is that they have actually clicked on the email and it's a read email, and I just think you need to clarify that with the witnesses.

[223] As the subject matter of the email simply referred to the name of the Drug and Alcohol Policy, and not that it had changed, it is possible that a number of employees would have received the email during non-work time and left it 'unread'. This would be understandable given that at the time the text message and email were sent, employees had not yet been advised that the Drug and Alcohol Policy had changed at the toolbox talks so there would have been no reason for them to give the text or email any particular attention. This is one possible explanation as to why Hutchison's records show that it sent the email and text message to Mr Hancock and other employees who gave evidence at the hearing but that these employees said that they do not have a recollection of receiving these communications.

[224] The only communication of the changes to the Drug and Alcohol Policy which occurred during work time was during the toolbox talks on 17 and 19 March 2023. I accept the evidence of Mr Moon that Mr Hancock, Mr Beesley, Mr Bowman, Mr Samperi, Mr Farrell, Mr Dominguez and Mr McGrath attended a toolbox talk on 17 and/or 19 March 2023 and were informed of the changes to the policy. In my view, it was appropriate for Hutchison to raise the changes to the Drug and Alcohol Policy at the toolbox talks but more should have been done to train employees in the policy to ensure that they understood the changes and remembered them. This was particularly important given Mr Hughes' evidence that the incidence of employees testing positive for alcohol under both the current and former policy was very rare. That there were just two incidents of employees drinking during meal breaks which prompted the change in policy indicates that employees rarely attended work after drinking alcohol. In such circumstances, it is quite likely that although employees viewed the Drug and Alcohol Policy as important, they did not regard the changes to the Drug and Alcohol Policy that were communicated at the toolbox talks memorable or significant, as the changes did not impact upon the usual practice of most employees of not drinking alcohol before work.

[225] The problem with using the toolbox talks as the only method of explaining the changes to the Drug and Alcohol Policy during work time is that employees routinely attended toolbox talks before every shift. As such, it could not reasonably be expected that they would remember every single issue that was discussed during a one year period where they attended more than one hundred such meetings, particularly as the toolbox talks only went for three to four minutes, according to Mr Moon. I believe that employees would have been more likely to retain information about the changes to the Drug and Alcohol Policy if there had been a dedicated training session where their knowledge of the changes was tested, including the number of hours they would need to be alcohol free to ensure a reading of 0.00 when commencing work. There should also have been signed confirmation from each employee that they had read and understood the changes to the policy. It is important that employees are aware of what is required to have 0.00 BAC, particularly as employees work shift work, and unlike a person who works during the day only, may find themselves attending work after socialising with family and friends.

[226] In Mr Hancock's case, the day that he attended work after drinking wine was Easter Sunday, a time which is often associated with socialising and celebration. There is no evidence to indicate that employees have ever been provided with information about what conduct might lead to a person breaching their obligation to have a 0.00 BAC when attending work. Although employees working in the rail areas were required to a have a 0.00 BAC when attending work, prior to the amendment of the Drug and Alcohol Policy, the policy provided that a rail worker who produced a BAC greater than 0.00 but less than 0.02 would be allowed to return to work outside the Hutchison Ports Sydney Rail Siding. In other words, prior to the amendment of the policy, there were no disciplinary sanctions for an employee who tested greater than 0.00 but less than 0.02. It was significant that from March 2023, employees would be disciplined if they tested for alcohol at a level greater than 0.00, however there is no indication that this was explained to employees at the toolbox talks or in any other forum where employees and management were present. This may well have been implicit from the fact that the cut off levels had changed, but in my view, the serious consequences for employees who tested greater than 0.00 warranted this being clearly and carefully explained.

[227] I accept that Hutchison has posters and flyers around the Port Botany Terminal which state that the cut off level is 0.00 However, there was no evidence before me about the extent to which employees read these posters and flyers. The posters and flyers may well be a useful source of information for a person who is looking to ascertain key details about the Drug and Alcohol Policy. However, if an employee already believes that they are aware of this information or they are not interested or have no need to obtain it, it seems likely to me that such employees will just walk past posters without stopping to read them. If any employee stopped to read the poster on the human resources noticeboard, they would have been incorrectly informed that the cut off level for alcohol was 0.02. Mr Hancock gave evidence that it was this noticeboard that he regularly reviewed.

[228] Having regard to the material before me, I believe that the steps which Hutchison took to communicate with employees about the changes to the Drug and Alcohol Policy were inadequate and not appropriate for employees who operate machinery and do not regularly use computers at work. The fact that the WHS Committee made certain recommendations to Hutchison about the way that the changes should be communicated does not relieve Hutchison of its obligations to ensure that employees are properly informed and trained about policies, particularly one as important as the Drug and Alcohol Policy. Given the evidence that toolbox meetings take three to four minutes, it is likely that only one or two minutes were dedicated to informing employees about the changes. Hutchison rightly places a high degree of importance on the Drug and Alcohol Policy so it is difficult to understand why Hutchison invested so little time communicating the changes to employees. Such actions on the part of Hutchison had the potential to diminish the importance of the policy in the eyes of employees.

[229] At the very least, there should have been a dedicated training session in relation to the changes, including the steps that employees needed to take to ensure that they were compliant with the Drug and Alcohol Policy when attending work. The training should have tested the knowledge of employees about the policy and employees should have been required to acknowledge in writing that they had attended the training and understood the requirements of the policy.

Was Mr Hancock aware of the changes to the Drug and Alcohol Policy?

[230] Hutchison has invited me to find that Mr Hancock was aware of the changes to the Drug and Alcohol Policy and that when he denied awareness at the disciplinary meeting on 16 April 2024, he was not truthful as to his ignorance of the 0.00 alcohol requirement. Hutchison contended that to find otherwise, I would need to be satisfied of all of the following:

- Mr Hancock did not receive or view the email sent to his personal email address on 16 March 2023;
- Mr Hancock did not receive or view the text message sent to his personal mobile number on 16 March 2023; and
- Mr Hancock was not advised of the amendments to the policy by Mr Moon.

[231] As noted above, the text message did not advise that the Drug and Alcohol Policy had changed. So even if I was to accept that, contrary to Mr Hancock's evidence, he received or saw the text message, this alone would not lead to a conclusion that he was aware of the changes to the policy. Similarly, the fact that Hutchison sent the email to Mr Hancock does not establish that Mr Hancock opened the email. I am prepared to accept that Mr Hancock did not open the

email as there is no evidence before me which demonstrates otherwise. It is likely that Mr Hancock was advised of the amendments to the policy by Mr Moon, but possible that Mr Hancock did not retain this information because it was not reinforced by dedicated training. I also note that there is no evidence of Mr Hancock ever attending work after consuming alcohol, apart from the occasion on 31 March 2024, so he may not have regarded the change to the policy as being particularly significant.

[232] I have carefully considered the evidence of Mr Hancock and find on the balance of probabilities that he was not aware that the cut off level for alcohol had changed from 0.02 to 0.00 in March 2023 when he breached the Drug and Alcohol Policy on 31 March 2024. He expressed this view to the tester immediately upon becoming aware that he had tested positive however the tester was not called to give evidence. He also made this claim during the disciplinary meeting on 16 April 2024. His view that the cut off level was 0.02 was reinforced by the poster on the human resources noticeboard. I observed Mr Hancock giving evidence and found him to be a genuine and credible witness. The fact that Hutchison was not able to definitively establish that Mr Hancock was aware of and understood the changes is a situation of its own making and could have been avoided if it had provided proper training then required Mr Hancock to acknowledge in writing that he was aware of and understood the policy.

Employment history and previous written warnings

[233] During the hearing, Mr Hughes appeared to suggest that a person could be dismissed because of a breach of the Drug and Alcohol Policy even if no previous breaches had occurred. He relied on the wording of the Drug and Alcohol Policy which stated that following the first positive result from the confirmation test, a written warning 'may' be issued to the employee, suggesting that other sanctions, including dismissal could be imposed. Mr Hughes also relied upon the Drug and Alcohol Policy's reference to 'Disciplinary Guidelines'.[180] The Disciplinary Guidelines were not in evidence before the Commission. Ultimately, I do not need to determine whether Hutchison is able to dismiss an employee for a breach of the Drug and Alcohol Policy if less than two previous breaches have occurred, given that there appears to be no dispute that two warnings have been issued to Mr Hancock for previous breaches of the policy and that the events of 31 March 2024 may be considered the third breach.

[234] In relation to the warnings, Hutchison submitted that it could rely upon them in dismissing Mr Hancock whereas Mr Hancock submitted that the warnings were 'null and void' as there was no basis to issue them. Hutchison noted during the hearing that Mr Hancock suggested that the warnings were 'in dispute' and submitted that Mr Hancock's evidence went no further than a generalised level of dissatisfaction as to the outcome of each warning and the context within which he was ultimately warned. Hutchison submitted that in many cases, the warnings appeared to be the outcome of intense discussion and negotiations with Mr Hancock's representatives and give important context to the unfair dismissal application.

[235] I agree with Hutchison that it was entitled to rely upon the previous warnings in determining the appropriate penalty for Mr Hancock's breach of the Drug and Alcohol Policy on 31 March 2024. However, I do not accept that many of the warnings were the outcome of negotiation with the MUA. The evidence established that this was only the case with the warning issued in relation to the incident which occurred on 26 January 2020.

[236] Mr Hancock's concerns about the issuing of the warnings are matters which are relevant to my consideration under s.387(h). Hutchison appeared to suggest that Mr Hancock could not raise such concerns as the warnings had not been 'revoked' or subject to outstanding proceedings before the Commission. I do not accept this. There may be circumstances where it is unfair to an employer to permit an employee to reagitate every aspect of their previous disciplinary history in an unfair dismissal case. These circumstances might include that responding to an employee's concerns about previous warnings might put an employer to excessive effort and expense, particularly if key personnel involved in such matters are no longer working for the employer. There might also be situations where an employee did not object to the warning at the time it was issued. However, neither of these situations apply in the current matter, as Mr Hughes was in a position to give evidence about the issuing of both warnings. Further, it should not have come as a surprise to Hutchison that Mr Hancock would question the validity of both warnings in the event that Hutchison decided to rely upon them, given Mr Hancock's strong opposition to both warnings at the time they were issued. Both warnings were issued by Hutchison, not because Mr Hancock tested positive to a proscribed substance, but because Hutchison claimed that Mr Hancock refused to undergo a drug and/or alcohol test which is treated as a breach of the Drug and Alcohol Policy, recorded as a positive test and leads to disciplinary action, which may include termination of employment.

[237] Evidence emerged during the hearing which casts real doubt on the basis for Hutchison's finding that Mr Hancock refused to undergo a drug and/or alcohol test on 23 October 2019. Mr Hughes reviewed Hutchison's files in relation to the similar incident which occurred on 29 April 2020 when preparing his witness statement so it is reasonable to assume that he would have undertaken the same exercise when responding to Mr Hancock's witness statement in relation to the incident on 23 October 2019. Despite this, Mr Hughes did not produce records which established that Mr Sorrentino was tested (as he had in relation to the 29 April 2020 incident) and gave conflicting evidence about whether Mr Hancock was required to undergo a test. Mr Hughes initially said that a person from the Hutchison operational management team directed Mr Hancock to get tested then later agreed that no shift manager or shift supervisor directed Mr Hancock to get tested because they were deprived of that opportunity. Mr Hughes claimed that Mr Smith was aware that testers were on their way to the site when Mr Smith and Mr Hancock had a conversation after Mr Hancock returned from his break. However, Mr Hughes did not allege that Mr Hancock was aware that the testers were on their way. While it is not my role to disturb findings made by Hutchison five years before the dismissal about a separate disciplinary matter, it is appropriate to examine Mr Hancock's past actions, particularly with respect to the Drug and Alcohol Policy to ascertain whether the breach on 31 March 2024 is part of a course of conduct. Mr Hancock's departure from the workplace on 23 October 2019 may have been unauthorised but appears to be explained by the distress he was feeling as a result of being held responsible for the incident by Mr Sorrentino. In any event, I have difficulty in accepting, based on Mr Hughes' evidence alone, that Mr Hancock could have reasonably been expected to know that a drug test may be required and that he evaded such a test.

[238] The Drug and Alcohol Policy requires employees and contractors to be tested if they have been involved in an accident or incident involving the operation of equipment or any other piece of machinery 'regardless of the incident severity' and requires managers to ensure persons(s) are relieved immediately of their duties where required for the purposes of drug and alcohol testing following an incident. Having become aware of the incident on 23 October 2019, Mr Cachia was therefore required to immediately relieve Mr Smith, Mr Hancock and Mr

Sorrentino. This did not occur. It concerns me that Mr Hughes appears to believe that it was acceptable for Mr Cachia to give permission to Mr Sorrentino to leave the terminal because Mr Cachia was not aware of the seriousness of the incident, given that the seriousness of the matter is not relevant to the requirement that testing occur. I am also concerned that Mr Cachia took no steps to inform Mr Hancock that he was required to be tested as Mr Cachia was obliged to do under the Drug and Alcohol Policy.

[239] The second warning issued for an incident on 26 January 2020 arose from the target testing which Mr Hancock was required to submit to as a result of the 23 October 2019 incident. As with the incident which led to the first warning, it was unclear whether Mr Hancock, had, in fact, been directed to get tested. It appears that testers were on site on 26 January 2020 to conduct random testing and that the Shift Manager viewed this as an opportunity to test Mr Hancock too, given that he was subject to target testing. Mr Hancock was aware that there was disagreement between Mr Kreger and the Shift Manager about whether Mr Hancock should be tested. However, Mr Hancock was not involved in that conversation and said if the Shift Manager had directed him to get tested, he would have done so. A significant matter, which is not disputed by Hutchison, and which weighs in favour of the credibility of Mr Hancock's version of events, is that he was permitted to continue to work following the alleged refusal both that day and the following day. As the purpose of target testing is to ensure that a person undergoing testing does not attend work with any proscribed substances in their system above the stipulated cut off levels, permitting Mr Hancock to continue working after refusing a test could have exposed Hutchison to significant risk and the managers responsible to serious disciplinary action. Having regard to this, it is difficult for me to understand why Mr Hughes formed the view that Mr Hancock's version of events was 'not credible'.

[240] It was clear from the moment that disciplinary action commenced in relation to the incident on 26 January 2020 that Hutchison was considering terminating Mr Hancock's employment. It was in this context that Mr Hancock said he reluctantly agreed to a disciplinary outcome which included a warning and lengthy suspension. The agreement included a requirement that the MUA discontinue a dispute it had lodged with the Commission in relation to both warnings related to the Drug and Alcohol Policy. Hutchison advised Mr Hancock that if he did not agree to such an outcome, his employment would be terminated. In its submissions, Hutchison emphasised that the second warning was issued after 'active representation' from the MUA, however the correspondence provided by Hutchison to the Commission showed that both the MUA and Mr Hancock believed that termination was an inevitable outcome if Mr Hancock did not accept a written warning and a lengthy unpaid suspension. In this regard, Mr McAleer's correspondence to Mr Willy noted the following:

> Craig has accepted the Unions advice that it is bordering on impossible to be reemployed after a termination, even if it is found to be an unfair or unlawful one. The fact that the Company threatened myself and Craig Hancock into accepting the outcome or termination would be reconsidered is an unwarranted attack and is condemned in the strongest possible terms.

[241] In my view, Mr Hancock's third breach of the Drug and Alcohol Policy on 31 March 2024 needs to be considered in the context of the conduct involved in the two previous breaches. Neither of the earlier breaches involved Mr Hancock testing positive for drugs and alcohol. It is likely that Mr Hancock has attended work during the 11 years that he was employed over one

thousand times. During that period, he has been subject to many drug and alcohol tests, especially due to target testing and has never tested positive prior to 31 March 2024.

[242] The previous breaches are with respect to allegations that Mr Hancock refused to undergo a drug and alcohol test. It is not alleged in either case that Mr Hancock avoided the test because he had consumed drugs or alcohol. The fact that Mr Hancock was permitted to return to work on 26 January 2020 following the alleged refusal shows that Hutchison management held no such concerns.

[243] In both incidents, there appeared to be inconsistent application of the Drug and Alcohol Policy with managers in both cases failing to discharge their obligations. In the first incident, there is no allegation that Mr Hancock refused to take a drug test or that he was aware that drug testers were travelling to the site. Mr Sorrentino was permitted to get tested the following day (because he was permitted to leave the site in breach of his manager's obligations), but Mr Hancock was not. In a similar incident which occurred on 29 April 2020, Mr Way was not required to be tested despite being involved in an incident which triggered a mandatory test.

[244] Mr Hughes conceded during the hearing that Mr Hancock was not directed to be drug tested during the first incident. In relation to the second incident, Mr Hughes was aware that both Mr Hancock and Mr McAleer had complained that Hutchison had never identified the manager who directed Mr Hancock to be drug tested. It would have been a simple matter for Mr Hughes to review Hutchison's files (as he did for the 20 April 2020 incident) to provide this information, but Mr Hughes did not do so.

[245] Because of the concerns I have about the circumstances in which the warnings about the incidents on 23 October 2019 and 26 January 2020 were issued, I am unable to find that they establish that Mr Hancock has engaged in a course of conduct which involves breaching the Drug and Alcohol Policy. However I note that the first written warning also deals with the issue of Mr Hancock entering the work cage alone, failing to wear a safety harness and failing to unlatch the safety chain from the spreader. This matter is serious, however it occurred 4.5 years before the dismissal and there is no indication that there has been any recurrence of the conduct referred to in the warning. Further I note that Mr Hancock expressed concern that the other employee involved in the matter, Mr Sorrentino, was not disciplined and that Hutchison did not refute this claim.

[246] I now turn to consider the other warnings that have been issued which do not relate to the Drug and Alcohol Policy. The correspondence in relation to the Absence Management Plan does not appear to be a warning so I have not taken it into account in my determination of the matter. The Final Warning issued on 9 June 2015 was issued nine years before the dismissal and appears to arise from industrial action taken about a safety matter. Given the age of the warning and that there appears to have been no recurrence of the conduct it refers to, I have given it little weight in my consideration.

[247] This leaves the Final Written Warning issued on 5 June 2023 in relation to unauthorised leave. The unauthorised leave occurred in the context of Mr Hancock taking leave to pursue alternative employment to avoid redundancy at Hutchison during a quiet time. Mr Hancock explained that he had filled out leave forms incorrectly. Hutchison appeared to have doubts

about the explanation. In my view, Mr Hancock's conduct in this matter is at the lower end of the seriousness scale.

Mr Hancock's consumption of alcohol on 31 March 2024

[248] Mr Hancock's evidence is that he consumed alcohol approximately 30 minutes before commencing work on 31 March 2024. This was in circumstances where Mr Hancock claims that he believed that the cut off level for alcohol was 0.02 rather than 0.00. Hutchison submitted that I must give Mr Hancock's actions in attending work in these circumstances significant weight on any assessment of harshness. However, it is difficult for me to do so when Hutchison provided no evidence about the length of time it takes for a person's BAC to return to 0.00 after consuming alcohol. There is no guidance about this matter in the Drug and Alcohol Policy either. There is also no evidence before me about the length of time it takes for a person's BAC to return to 0.02 after consuming alcohol which would have been of assistance in assessing the reasonableness of Mr Hancock's actions, given that I have accepted that he was unaware that the Drug and Alcohol Policy had changed.

[249] I accept that it was very foolish and reckless of Mr Hancock to consume alcohol before his shift, taking into account the dangerous and safety critical environment in which he performed work. However, as noted above, Mr Hancock has never previously tested positive to drugs or alcohol during his 11 years of employment despite being the subject of target testing for lengthy periods. The Drug and Alcohol Policy contemplates that Hutchison will ordinarily issue a written warning to a person who tests positive for the first time rather than terminate their employment. It seems likely that this would occur in the case of a confirmatory test of 0.017 which would be regarded as a low range reading. I appreciate that the situation is complicated in Mr Hancock's case by the previous warnings. However, Hutchison is inviting me to attribute a very high level of seriousness to Mr Hancock's conduct in consuming alcohol before a shift which appears inconsistent with the scheme of escalating warnings in the Drug and Alcohol Policy. I also note that during cross-examination, it was suggested to Mr Hancock that on 31 March 2024, he could have been expected to work in the rail areas where the cut off level for rail has always been 0.00. Mr Hancock responded that he would not have been required to work on rail because it does not operate on weekends or at nights.[181]

[250] Further, the availability of breathalysers sends somewhat of a 'mixed message' to employees about the acceptability of drinking alcohol before they commence work. On one hand, employers who have such equipment available are to be commended for ensuring that employees do not attend work with any alcohol in their systems. On the other hand, such equipment may signal to employees that their employer acknowledges that they may consume alcohol before commencing work. In any event, I note the evidence of some witnesses that the breathalysers were not working. If Hutchison does not wish to condone any consumption of alcohol before commencement of work, it may be open to it to prohibit consumption of alcohol for a specific number of hours before a shift commences, however I note it does not do so.

[251] Finally, I note that Mr Hancock's evidence is that the alcohol was consumed on Easter Sunday evening in somewhat spontaneous circumstances which goes some way to explaining (although not excusing) his actions.

[252] Mr Hancock's decision to consume alcohol before work on 31 March 2024 must be considered in the context of my finding that Mr Hancock believed that the cut off level for alcohol was 0.02. I accept that Mr Hancock's decision to consume alcohol was foolish and reckless, and that this is a matter which weighs in favour of a conclusion that the dismissal was not unfair. However, for the reasons already stated, I do not attribute the very high level of seriousness to this matter advocated by Hutchison. As such, it does not outweigh other matters such as Mr Hancock's knowledge of the policy and my findings about Mr Hancock's employment history in my overall assessment of the factors under s.387.

Was the dismissal related to Mr Hancock's role as a union delegate?

[253] There are aspects of Mr Hancock's previous disciplinary history which indicate that Hutchison tolerated some employees breaching the Drug and Alcohol Policy but not others, and applied the Drug and Alcohol Policy inconsistently. I also note that the correspondence from Mr McAleer to Mr Willy dated 24 February 2020 referred to protected industrial action occurring at Hutchison around the time of the 26 January 2020 incident which led to Mr Hancock being threatened with dismissal, then the second written warning being issued to Mr Hancock. While inferences may be able to be drawn about the reasons that Mr Hancock received warnings in relation to the incidents on 23 October 2019 and 26 January 2020, the evidence does not establish, on the balance of probabilities, that the dismissal was related to Mr Hancock's role as a union delegate.

Is the Commission satisfied that the dismissal of Mr Hancock was harsh, unjust or unreasonable?

[254] I have made findings in relation to each matter specified in s.387 as relevant.

[255] I must consider and give due weight to each of these matters as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[182]

[256] Mr Hancock's breach of the Drug and Alcohol Policy establishes that there was a valid reason for the dismissal and is also relevant to my consideration under s.387(h). This weighs in favour of a finding that the dismissal was not unfair. My findings in relation to Mr Hancock's actions in consuming alcohol before a shift and with respect to ss.387(b), (c) and (d) also weigh in favour of a finding that the dismissal was not unfair. The matters in ss.387(f) and (g) are neutral considerations and s.387(e) is not relevant.

[257] At the outset, I note that Mr Hancock was tested following an incident on 31 March 2024 but that Hutchison did not rely upon the incident as a reason for the dismissal. There were no submissions made during the hearing about Mr Hancock's culpability in relation to this incident, so I have not made any findings about the incident, and it has not been considered as part of the assessment of the factors under s.387.

[258] A disciplinary history which includes a number of recent warnings will usually weigh in favour of a finding that the dismissal was not unfair. In Mr Hancock's case, most of the conduct which is subject of previous warnings occurred at least 4.5 years before the dismissal, which shows that Mr Hancock's conduct and performance was satisfactory during the 4.5 year

period prior to his dismissal. The exception to this is the unauthorised leave incident which I have found to be on the lower end of the seriousness scale.

[259] The most significant incidents in Mr Hancock's employment history are those involving breaches of the Drug and Alcohol Policy, however because of the concerns I have about the circumstances in which the warnings were issued, which I have set out in detail earlier in this decision, I am unable to find that they establish that Mr Hancock has engaged in a course of conduct which involves breaching the Drug and Alcohol Policy. What remains is the issue of Mr Hancock entering the work cage alone, failing to wear a safety harness and failing to unlatch the safety chain from the spreader. This conduct occurred 4.5 years before the dismissal and there is no indication that there has been any recurrence of the conduct. Taking into account all of these matters, I am unable to accept that Mr Hancock's disciplinary history weighs in favour of a finding that the dismissal was not unfair.

[260] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of Mr Hancock was harsh and unreasonable because the seriousness of Mr Hancock's conduct in breaching the Drug and Alcohol Policy when considered with his previous disciplinary history, is outweighed by the following matters:

- Mr Hancock's age and length of service;
- My finding that Mr Hancock was not aware of the changes to the Drug and Alcohol Policy which reduced the cut off level for alcohol to 0.00;
- Hutchison did not provide adequate training to employees in relation to the changes to the Drug and Alcohol Policy including the steps that employees needed to take to ensure that they were compliant with the Drug and Alcohol Policy when attending work;
- Mr Hancock's confirmatory test result complied with the policy which he believed applied on 31 March 2024.

[261] I am therefore satisfied that Mr Hancock was unfairly dismissed within the meaning of s.385 of the FW Act.

Remedy

[262] Being satisfied that Mr Hancock:

- made an application for an order granting a remedy under s.394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of s.385 of the FW Act,

I may, subject to the FW Act, order Mr Hancock's reinstatement, or the payment of compensation to Mr Hancock.

Is reinstatement of Mr Hancock inappropriate?

[263] Mr Hancock is seeking reinstatement and submitted that reinstatement is appropriate.

[264] Hutchison submitted that reinstatement is inappropriate because it is entitled to hold its employees to the highest level of compliance with its policies with respect to employee health

and safety. Any assessment of Mr Hancock's performance history shows that Mr Hancock had difficulty in achieving and maintaining compliance with a range of Hutchison's policies.

[265] Hutchison submitted that it operates in a safety critical environment. Hutchison and its employees need to be able to rely upon Mr Hancock to not arrive at work having consumed alcohol. The lost trust expressed by Mr Hughes and Mr Stockdale is sound and rationally based. For this particular employment relationship to be viable, there needs to be adherence to the Drug and Alcohol Policy. The fear of recurrence is more real than imagined having regard to Mr Hancock's conduct and history of warnings. There is nothing irrational about the views expressed by Mr Hughes and Mr Stockdale. The Commission should find by accepting the evidence of Mr Hughes and Mr Stockdale that this necessary trust and confidence was legitimately lost. The involvement of Mr Hughes in the two prior warnings gave him the necessary context.

[266] A Full Bench of the Commission has helpfully identified the following propositions relevant to the impact of a loss of trust and confidence on the appropriateness of an order for reinstatement:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
- An allegation that there has been a loss of trust and confidence must be soundly and rationally based, and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.
- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.[183]

[267] The Full Bench concluded that, "[u]ltimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party."[184]

[268] I accept that Hutchison is entitled to hold its employees to the highest level of compliance with its policies with respect to employee health and safety. However, the evidence in this case shows that it has not done so on a consistent basis, particularly with respect to the conduct of managers involved in the incidents on 23 October 2019 and 26 January 2020. I also

accept that Hutchison and its employees need to be able to rely upon Mr Hancock to not arrive at work having consumed alcohol. The incident on 31 March 2024 was the first time that Mr Hancock ever tested positive for alcohol during his 11 years of service and throughout lengthy periods of target testing. This indicates that the events of 31 March 2024 are more likely to be an isolated rather than a regular incident. To the extent that Hutchison is concerned about Mr Hancock engaging in this behaviour in the future, it can manage this risk through target testing.

[269] In relation to Hutchison's claims that Mr Hancock had difficulty in achieving and maintaining compliance with a range of Hutchison's policies, I reject this as the only policy that was in evidence and that was referenced in any of Mr Hancock's disciplinary history was the Drug and Alcohol Policy. I have been unable to find that Mr Hancock has engaged in a course of conduct which involves breaching the Drug and Alcohol Policy because of the concerns I have about the circumstances in which the warnings about the incidents on 23 October 2019 and 26 January 2020 were issued.

[270] Having regard to all of these matters, I have difficulty in accepting that Mr Hughes' and Mr Stockdale's claims that they have lost trust and confidence in Mr Hancock are soundly and rationally based.

[271] Mr Hancock is a long serving and experienced employee who is well regarded by his colleagues and Mr Moon. He had a satisfactory performance and conduct record during the 4.5 years prior to the dismissal so he has shown that he is able to comply with his employer's policies and expectations for an extended period. His responses during the disciplinary meeting on 16 April 2024 demonstrate that he is remorseful for his actions on 31 March 2024. Taking into account these matters, I am satisfied that a sufficient level of trust and confidence can be restored between Hutchison management and Mr Hancock to make the relationship viable and productive and that reinstatement is not inappropriate.

Reinstatement – to what position should Mr Hancock be appointed?

[272] Section 391(1) of the FW Act provides that an order for Mr Hancock's reinstatement must be an order that Mr Hancock's employer at the time of the dismissal reinstate Mr Hancock by:

(a) reappointing Mr Hancock to the position in which Mr Hancock was employed immediately before the dismissal; or

(b) appointing Mr Hancock to another position on terms and conditions no less favourable than those on which Mr Hancock was employed immediately before the dismissal.

[273] In the absence of any evidence to the contrary, I am satisfied that it is open to me to make an order reappointing Mr Hancock within 21 days of the date of this decision to the position in which Mr Hancock was employed immediately before the dismissal.

Is it appropriate to make an order to maintain continuity and/or lost pay?

[274] Section 391(2) of the FW Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order that the Commission considers appropriate to maintain the following:

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer or, if applicable, the associated entity.

[275] Section 391(3) of the FW Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order that the Commission considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

[276] Section 391(4) of the FW Act provides that, in determining an amount for the purposes of such an order, the Commission must take into account:

(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

[277] An order to restore lost pay does not necessarily follow an order for reinstatement. The Commission may only make an order if it considers it appropriate to do so and only make an order that the Commission considers appropriate.[185] Where an employee has engaged in misconduct, the Commission may refuse to make any order to restore lost pay.[186]

[278] Taking into account all of the circumstances of the case, including that Mr Hancock was unemployed at the time of the hearing, his age and length of service, I consider it appropriate to make orders to maintain Mr Hancock's continuity of employment and period of continuous service with Hutchison and in respect of lost remuneration.

[279] In my view, it is appropriate that there is some consequence for Mr Hancock in relation to the breach of the Drug and Alcohol Policy. The decision of Deputy President Easton in *Reece Goodsell v Sydney Trains*[187] helpfully lists the following examples of where the Commission has reduced back pay because of the employee's conduct:

(a) *Hilder v Sydney Trains* - a 50% reduction in lost earnings where the dismissal was because of a breach of the drug and alcohol policy ;[188]
(b) *Dyson v Centennial Myuna Pty Ltd* - six months backpay was reduced by three months because it was considered appropriate that the employee bear a substantial degree of responsibility for the financial consequences of his dismissal;[189]
(c) *Johnson v Chelgrave Contracting Australia Pty Ltd* - backpay was reduced by 15% because the employee had not done everything he could have done in order to avoid a safety breach;[190]

(d) *Morcos v Serco Australia Pty Ltd* - no backpay was ordered because the employee 'had made a mistake by attending work after having consumed alcohol;'[191] and
(e) *Wakefield v Sunraysia Institute of TAFE* - backpay was reduced by 25% to take into account the employee's misconduct in sending the email to his former employer, and to 'reinforce to the Applicant the importance of not repeating this behaviour in the future'.[192]

[280] I have taken all of the circumstances of the case into account and have decided to reduce the amount Hutchison is required to pay as compensation by 50 per cent in recognition that Mr Hancock breached the Drug and Alcohol Policy on 31 March 2024. I therefore consider it appropriate to make an order causing Hutchison to pay to Mr Hancock fifty per cent of the amount that Mr Hancock would have earned for the period from his dismissal to the date of his reinstatement, less the notice paid on termination and any income earned during this period. If the parties are unable to reach an agreement on this amount, I will list the matter for determination of the amount to be paid.

Conclusion

[281] I have found that there was a valid reason for the dismissal because Mr Hancock breached the Drug and Alcohol Policy when he attended work on 31 March 2024 and tested positive for alcohol.

[282] I have also found that Mr Hancock was not aware of the changes to the Drug and Alcohol Policy which reduced the cut off level for alcohol to 0.00, Hutchison did not provide adequate training to employees in relation to the policy and that Mr Hancock's confirmatory test result complied with the policy which he believed applied on 31 March 2024.

[283] I have expressed concerns about two of the warnings that were previously issued to Mr Hancock and have not accepted that Mr Hancock's disciplinary history weighs in favour of a finding that the dismissal was not unfair.

[284] Based upon these findings, and Mr Hancock's age and long period of service, I have concluded that the dismissal was harsh and unreasonable. I have made orders reappointing Mr Hancock to the position in which Mr Hancock was employed immediately before the dismissal, maintaining the continuity of Mr Hancock's employment and with respect to lost remuneration within 21 days of the date of this decision.

[285] An order giving effect to this decision has been separately issued in PR784584.

DEPUTY PRESIDENT

Appearances:

Mr K. *Bond*, Legal Officer from the CFMEU, for the Applicant
Mr C. *Hancock*, Applicant

Mr P. *Brown*, Solicitor from Baker & McKenzie, for the Respondent

Hearing details:

2024
27 and 27 August
In person, Sydney

Final written submissions:

Applicant: 18 September 2024 and 11 October 2024 (in reply)

Respondent: 2 October 2024

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<PR784582>

[1] Witness Statement of Criag Hancock dated 26 July 2024 [6]-[7], Digital Hearing Book (DHB), 56.
[2] Ibid [8], DHB 56
[3] Ibid [9], DHB 56
[4] Ibid [10], DHB 56
[5] Ibid [12], DHB 56
[6] Ibid [13], DHB 56
[7] Ibid [73], DHB 67
[8] Ibid [71], DHB 67

[9] Statement of Geoff Hughes [2], DHB 310
[10] Ibid [13]-[16], DHB 312
[11] Ibid [17]-[19], DHB 312
[12] Witness Statement of Criag Hancock dated 26 July 2024 [74]-[76], DHB 67
[13] Ibid [77], DHB 67
[14] Statement of Geoff Hughes [26]-[29], DHB 313-314
[15] Ibid [30]-[31], DHB 314
[16] Ibid [34]-[40], DHB 315-323
[17] Ibid [44], DHB 323
[18] Witness Statement of Criag Hancock dated 26 July 2024 [82], DHB 68
[19] DHB 209-210
[20] Transcript PN433
[21] Witness Statement of Criag Hancock dated 26 July 2024 [84], DHB 68
[22] Ibid [85]-[87], DHB 68-69
[23] Ibid [90]-[93], DHB 69
[24] Statement of Geoff Hughes [7], DHB 311
[25] Transcript PN2472-PN2476
[26] Transcript PN2477
[27] Statement of Geoff Hughes [8], DHB 311
[28] Additional Statement of Geoff Hughes dated 23 August 2024, [3]
[29] Statement of Geoff Hughes [10], DHB 311
[30] PN263-PN264
[31] PN274
[32] Ibid [11], DHB 311
[33] Ibid [12], DHB 312
[34] Transcript PN2214
[35] Transcript PN2216
[36] Transcript PN2218
[37] Transcript PN2219
[38] Transcript PN2348
[39] DHB 338
[40] DHB 341
[41] DHB 342
[42] DHB 171
[43] DHB 343
[44] DHB 343
[45] DHB 344
[46] DHB 344
[47] DHB 348
[48] DHB 351
[49] Statement of Michael Samperi dated 21 August 2024 [2], DHB 749
[50] Ibid [3], DHB 749
[51] Ibid [4], DHB 749
[52] Ibid [5], DHB 749

[53] Statement of Leigh Bowman dated 21 August 2024 [1]-[3], DHB 743
[54] Ibid [4], DHB 743
[55] Ibid [5], DHB 744
[56] Transcript PN910-PN928
[57] Statement of Benjamin Robertson dated 21 August 2024 [1]-[2], DHB 651
[58] Ibid [5], DHB 651
[59] Ibid [6], DHB 652
[60] Statement of Darren Trimmer dated 21 August 2024, DHB 657
[61] Ibid
[62] Ibid
[63] Statement of Malcolm Dominquez dated 21 August 2024, DHB 745
[64] Ibid
[65] Ibid
[66] Statement of Barry McGrath dated 21 August 2024 [1]-[4], DHB 649
[67] Ibid [5]-[7], DHB 649
[68] Ibid [9], DHB 650
[69] Transcript PN1218
[70] Statement of Kerry Farrell dated 21 August 2024 [1]-[2], DHB 664
[71] Ibid [5]-[6], DHB 665
[72] Ibid [2], DHB 664
[73] Ibid
[74] Ibid [3], DHB 664
[75] Ibid [4], DHB 664
[76] Statement of Lachlan Beesley dated 21 August 2024 [1], DHB 741
[77] Ibid [2], DHB 741
[78] Ibid [3], DHB 741
[79] Ibid [4], DHB 741
[80] Ibid [5], DHB 742
[81] Statement of Mark Armeni dated 21 August 2024, DHB 747
[82] Ibid
[83] Transcript PN1462
[84] Transcript PN1470
[85] Statement of Paul Wallington dated 21 August 2024, DHB 753
[86] Ibid
[87] Ibid
[88] Ibid
[89] Ibid
[90] Statement of Lawrence Moon dated 23 August 2023 [1]-[3]
[91] Ibid, [4]
[92] Ibid, annexure ‘LM1’
[93] Ibid
[94] Ibid
[95] Ibid
[96] Ibid

[97] Ibid, annexure ‘LM2’
[98] Ibid, [6]
[99] Transcript PN2499-PN2502
[100] Transcript PN2499-PN2505
[101] Transcript PN2520-PN2521
[102] Transcript PN2522-PN2521
[103] Transcript PN2524
[104] Ibid [16], DHB 57
[105] Ibid [17], DHB 57
[106] Ibid [18], DHB 57
[107] Ibid [19], DHB 57
[108] Ibid [20], DHB 57-58
[109] Witness Statement of Greg Smith dated 21 August 2024 [1]-[6], DHB 658
[110] Ibid, [7]-[8], DHB 659
[111] Ibid, [9]-[10], DHB 659
[112] Ibid, [11]-[12], DHB 659
[113] Witness Statement of Criag Hancock dated 26 July 2024 [21], DHB 58
[114] Ibid [23], DHB 58
[115] Ibid [24], DHB 58
[116] Ibid [24]-[25], DHB 58-59
[117] Ibid [26], DHB 59
[118] Ibid [27], DHB 59
[119] Ibid [28], DHB 59
[120] Ibid [29], DHB 59
[121] Statement of Geoff Hughes [66]-[67], DHB 326
[122] Ibid [68], DHB 326-327
[123] Transcript PN1817
[124] Transcript PN1822
[125] Transcript PN1915, PN1973
[126] Transcript PN1938
[127] Transcript PN1940
[128] Ibid
[129] Witness Statement of Criag Hancock dated 26 July 2024 [34], DHB 60
[130] Ibid [35]-[36], DHB 60-61
[131] Witness Statement of Criag Hancock dated 26 July 2024 [30], DHB 60
[132] Ibid [32]-[33], DHB 60
[133] Statement of Geoff Hughes [71], DHB 327
[134] Ibid
[135] Witness Statement of Chris Smith dated 21 August 2024 [2]-[3], DHB 654
[136] Witness Statement of Phil Way dated 21 August 2024 [5]-[6], DHB 643-644
[137] Witness Statement of Ryan Angwin dated 21 August 2024 [6], DHB 646
[138] Witness Statement of Chris Smith dated 21 August 2024 [5]-[6], DHB 654-655
[139] Witness Statement of Phil Way dated 21 August 2024 [8], DHB 644
[140] Witness Statement of Ryan Angwin dated 21 August 2024 [8], DHB 646

[141] Witness Statement of Criag Hancock dated 26 July 2024 [37], DHB 61

[142] Ibid [40], DHB 61

[143] Ibid [38]-[39], DHB 61

[144] Ibid [41], DHB 61

[145] Ibid [44]-[46], DHB 62

[146] Ibid [48]-[49], DHB 62-63

[147] Ibid [50], DHB 63

[148] Ibid [51], DHB 63

[149] Ibid [52]-[53], DHB 63

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[152] Ibid [57], DHB 64

[153] Ibid [58]-[61], DHB 64-65

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[159] DHB 603

[160] Transcript PN588

[161] DHB 602

[162] Transcript PN 632

[163] DHB 605-606

[164] Statement of Geoff Hughes [52], DHB 324

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[168] Ibid [58], DHB 325

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[170] Ibid [26], DHB 244

[171] Transcript PN2550-PN2554

[172] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

[173] [2020] FWCFB 1373

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[175] [2014] FWCFB 6249

[176] [2015] FWCFB 1033

[177] [2024] FWCFB 401

[178] Ibid, [115]-[117]

[179] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, [55].

[180] Transcript PN1701-PN1769

[181] Transcript PN116-117

[182] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].

[183] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, [27].

[184] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, [28].

[185] *Aurora Energy Pty Ltd v Davison* PR902108 (AIRCFB, Watson SDP, Williams SDP, Holmes C, 8 March 2001), [25].

[186] See, eg, *Regional Express Holdings Ltd v Richards* [2010] FWAFB 8753, [29].

[187] [2023] FWC 3209, [183]

[188] [2019] FWC 8412, [142]

[189] [2020] FWC 5486

[190] [2020] FWC 5784

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[192] [2019] FWC 4979, [123]